TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 894.

THE UNITED STATES, PETITIONER,

vs.

CHARLES S. EVANS AND HARRY J. O'DONNELL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 15, 1908.

(21174.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 394.

THE UNITED STATES, PETITIONER,

vs.

CHARLES R. EVANS AND HARRY J. O'DONNELL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

UNITED STATES, APPELLANT,
vs.
CHARLES R. EVANS ET AL. } No. 1773.

a Supreme Court of the District of Columbia.

UNITED STATES
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 25202. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Indictment.*

Filed in open court Jul- 8, 1906. J. R. Young, clerk.

In the Supreme Court of the District of Columbia, holding a criminal term, April term, A. D. 1906.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That on the first day of February in the year of our Lord one thousand nine hundred and six, and at the District aforesaid, one Charles R. Evans and one Harry J .O'Donnell, both late of the District aforesaid, by force and violence and by stealthy seizure and against resistance, unlawfully did take and attempt to take from the person of one Maurice J. Holloran, one pair of shoes of the value of one dollar, of the property of the said Maurice J. Holloran, and unlawfully did attempt to take from the person of said Maurice J. Holloran any other things of value which might then be in the possession of said Maurice J. Holloran, a more particular description whereof and the value whereof is to the grand jurors afore-
2 said unknown, with intent to steal the said pair of shoes and such other things of value, and that the said Charles R. Evans and Harry J. O'Donnell, did thereby at the District aforesaid, perpetrate and attempt to perpetrate an offense punishable by
2 imprisonment in the penitentiary, that is to say, the offense of robbery.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said first day of February, in the year afore-

said, and at the District aforesaid, the said Charles R. Evans and the said Harry J. O'Donnell, in perpetrating and in attempting to perpetrate the said offense of robbery as aforesaid, with force and arms in and upon the said Maurice J. Holloran, in the peace of God and of the said United States then and there being, feloniously, wilfully, purposely and of their malice aforethought, did make an assault; and that the said Charles R. Evans and the said Harry J. O'Donnell in perpetrating and in attempting to perpetrate the said offense of robbery as aforesaid, with a certain piece of wood in the hands of him the said Charles R. Evans then and there had and held, him, the said Maurice J. Holloran, in and upon the head of him the said Maurice J. Holloran, then and there feloniously, wilfully, purposely and of their malice aforethought, did strike, penetrate and wound; then and there feloniously, wilfully, purposely and of their malice aforethought, giving to the said Maurice J. Holloran by the striking, penetrating and wounding aforesaid, in perpetrating and in attempting to perpetrate the said offense of robbery as aforesaid, one mortal bruise, wound and contusion in and upon the head of him the said Maurice J. Holloran, of which said mortal bruise, wound and contusion, the said Maurice J. Holloran from the said first day of February, in the year aforesaid, until the eleventh
3 day of the same month of February, in the year aforesaid, and at the District aforesaid, did languish and languishing did live; on which eleventh day of February, in the year aforesaid, and at the District aforesaid, the said Maurice J. Holloran of the said mortal bruise, wound and contusion, did die.

And the grand jurors aforesaid, upon their oath aforesaid, do say that the said Charles R. Evans and the said Harry J. O'Donnell, him, the said Maurice J. Holloran, in the manner and form aforesaid, feloniously, wilfully, purposely and of their malice aforethought, did kill and murder; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 25202. United States vs. Charles R. Evans and Harry J. O'Donnell. Murder, first degree. Witnesses: L. W. Glazebrook, M. D., Clarle McGolrick, M. D., Laurence Whitney, M. D., T. P. Hartigan, M. P., Frank Bauer, M. P., Charles
4 Mullen, M. P., Albert Black. A true bill, Edward H. Downs, foreman.

3 *Arraignment, &c.*

Supreme Court of the District of Columbia.

WEDNESDAY, *January 30th, 1907.*

The Court resumes its session pursuant to adjournment, Mr. Justice Barnard presiding.

UNITED STATES
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 25202.

Indicted for murder in first degree.

Come as well the attorney of the United States, as the defendants in proper person in custody of the warden of the United States jail in and for the District of Columbia, and by their attorney, Thomas C. Taylor, esquire; whereupon the attorney of the United States presents to the court the mandate of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia in the above-entitled case; whereupon the defendants by their attorney file a demurrer to the indictment, which demurrer is overruled by the court; whereupon the defendants each being arraigned upon the indictment, each pleads thereto not
5 guilty and for trial put themselves upon the country and the attorney of the United States doth the like; whereupon the said defendants being called for trial, it is ordered that a jury to try the issue herein joined be empanelled; whereupon the jurors of the regular jury panel, a list of whom was regularly served upon the said defendants, being called, sworn upon their voir dire, and examined as to their competency for trying the said issue, the said panel is exhausted by reason of challenges and excuses without having completed said jury; and thereupon to complete the jury, the clerk is ordered to draw from the jury box in his custody the names of twenty (20) other persons, such persons to be summoned by the marshal to appear in this court at ten o'clock to-morrow, which names are accordingly drawn.

Verdict.

Supreme Court of the District of Columbia.

FRIDAY, *February 1st, 1907.*

The Court resumes its session pursuant to adjournment, Mr. Justice Barnard presiding.

UNITED STATES
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 25202.

Indicted for murder in first degree.

Come again the parties aforesaid, in the manner aforesaid,
6 and the jury that was respited yesterday, in custody as afore-

said; and thereupon after hearing the evidence in full, and
4 after the case is given them in charge, upon their oath say that the defendants are not guilty; to which verdict the attorney of the United States notes an appeal; whereupon it is considered that the defendants go thereof without day and be discharged from further custody in this cause.

Order extending time for filing bill of exceptions.

Filed March 15, 1907.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *vs.* CHARLES R. EVANS AND HARRY J. O'DONNELL.	Criminal. No. 25202.

Time for filing bill of exceptions in the above entitled cause is hereby extended for a period of ten (10) days.

JOB BARNARD,
Justice.

I assent:

THOS. C. TAYLOR.

7 *Bill of exceptions made part of the record.*

Supreme Court of the District of Columbia.

WEDNESDAY, *March 27th, 1907.*

The Court resumes its session pursuant to adjournment, Mr. Justice Barnard presiding.

UNITED STATES *vs.* CHARLES R. EVANS AND HARRY J. O'DONNELL.	No. 25202.

Indicted for murder in first degree.

Now comes here the attorney of the United States and prays the court to sign, seal, and make part of the record, his bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

5
8

Bill of exceptions.

Filed March 27, 1907.

In the Supreme Court of the District of Columbia.

UNITED STATES *vs.* CHARLES R. EVANS AND HARRY J. O'DONNELL, defendants.	Criminal. No. 25202.

Be it remembered that the above-entitled cause came on to be tried on the 30th day of January, 1907, before Mr. Justice Job Barnard and a jury, Messrs. Stuart McNamara and F. Sprigg Perry, appearing on behalf of the United States and Mr. Thomas C. Taylor for the defendants. Whereupon, the United States, gave in order to maintain the issue on its part joined, evidence tending to prove the following facts:

That Maurice J. Holloran, an inmate of the National Soldiers' Home in the District of Columbia, was found about midnight of February 1, 1906, near a lumber pile on Ohio avenue, between 12th and 13th streets NW., Washington, D. C. He was standing up with his hand on the lumber pile groaning and shaking. On being asked what was the matter with him, Holloran replied, "Oh! God, I don't know." Holloran was on the parking when found. His overcoat up and down had blood on it and his mustache was full of blood. No shoes were on his feet and he had no sock on his right foot. He was taken to No. 1 precinct police station, where it was seen that he had a cut on the back of his head, and his head was bleeding but no bruise appeared on his face. He had a quarter of a dollar and a bottle of medicine on him. Holloran said he was suffering terribly.

Dr. LAWRENCE WHITNEY, a witness on behalf of the United States, testified as follows:

On February 1, 1906, he was the resident physician at the Emergency Hospital. Maurice J. Holloran was brought in that night suffering from a lacerated wound at the back of the head, a small bruise on left side of the head and alc'holism. Made no fur-
9 ther examination and found no symptoms of a fracture of the skull. Holloran left the hospital the next day and was sent to the National Soldiers' Home.

Dr. E. C. MCGOULDRICK, a witness on behalf of the United States, testified as follows:

On February 1, 1906, he was one of the physicians at the hospital of the National Soldiers' Home and still holds that position. Maurice J. Holloran, formerly an inmate of the Home, died at the hospital there about midnight on February 11, 1906. He was,
6 comparatively speaking, a young man of fine physique. He

performed light duties at the Home. Witness was present when Dr. Glazebrook performed the autopsy. A large blood clot on the left side of the head was found and a smaller blood clot. Holloran came to the hospital as a patient on Friday, February 2nd, complained of tenderness near his ear. The only symptom of a fracture of the skull, was pain in this region. Holloran was conscious at the time. Witness diagnosed the case as one of alc'holism and treated Holloran as a man who had been on a spree. Holloran was employed as mail carrier from the Home to the hospital. He was in the hospital as a patient about two days, from February 2nd, when he went to work again as mail carrier.

At the autopsy there was found a fracture of the skull which could have been caused by a blow. Hemorrhage was the direct cause of death. He did not have the large blood clot when he came from the Emergency Hospital. General symptoms of fracture of skull are paralysis, blood in the ear, nose or mouth, unconsciousness, dullness. The first time he came in the hospital on February 2nd, he stayed about two days; at that time witness made only a superficial examination. The night he died, Holloran came again to hospital and was then suffering from great pain in the left side of the head. In about one-half hour, left pupil of eye became dilated and left eye-lid began to droop. He became unconscious in about one hour and died in about three or four hours after he came in. During the week prior to his death while doing his work, as usual, he complained of pain.

CHARLES HOEBERT, a witness on behalf of the United States, testified as follows:

He is an inmate of the National Soldiers' Home and was formerly a roommate of Maurice J. Holloran. Deceased came to his room on February 4th, and witness saw him lying on his bed. He said that the left side of his head hurt him. From that time on until his death Holloran seemed to be dull and in a stupor. Prior to this time deceased had been talkative, but during this time would talk only when witness addressed him directly. He was probably about 33 years old.

Dr. L. W. GLAZEBROOK, a witness on behalf of the United States, testified as follows:

Witness is the deputy coroner of the District of Columbia, and was such on February 1, 1906. He performed the autopsy at the National Soldiers' Home on February 13, 1906, upon the body of M. J. Holloran. White man apparently about 38 or 40 years old, weighing about 185 or 190 pounds and was very muscular. Found on left side of back of the head a small scalp wound having three small surgeon's stitches which was practically healed, leaving an ordinary scar. Found between scalp and skull directly above left ear evidence of old hemorrhage and considerable bleeding which was dried up and which had the appearance of having been made a

number of days previously. The wound above the left ear had the same general appearance as the one in the back of the head, apparently an old condition. There was a fissured fracture or
7 cracked condition of the skull just above the left ear. Radiating from this point there were three distinct fractures, one passing over the top of the head, one passing round head to
11 the back and one passing forward into the face. Skull fractured entirely through but there was no depression. Inside the skull there was a large hemorrhage, between the skull and the outside membrane which covers brain. It was one-half to three-quarters of an inch thick, and covered the whole left side of the head. This was a fresh blood clot. It had taken place either immediately before the man's death or only a few hours previously. Found also inside the skull evidence of an old hemorrhage and along the course of the fracture of the skull found dried blood, which was very hard, and had to be scraped off with the handle of a knife. This had the appearance of what might be called an old hemorrhage, an old clot, and had been there much longer than the large hemorrhage. Blood came from little nick in a blood vessel lying inside skull directly under one of the fractures. Death due to the large hemorrhage in brain resulting from fractured skull. The large hemorrhage I have described was a recent hemorrhage.

Fracture of skull on left side of head might have been caused by man violently falling and striking a hard flat surface as a concrete pavement or by man being struck by any smooth or flat object such as a stick.

The smaller blood clot inside the skull and the clot outside the skull but under the scalp, were not formed within two or three days prior to the man's death.

THOMAS P. HARTIGAN a witness on behalf of the United States testified as follows:

By Mr. MCNAMARA:

Q. What is your full name?

A. Thomas P. Hartigan.

12 Q. Where are you employed?

A. At police headquarters; I am a detective sergeant.

Q. Were you a detective sergeant last February?

A. Yes, sir.

Q. Do you know the defendants at the bar, Mr. Hartigan?

A. I do, sir.

Q. Mr. Evans and Mr. O'Donnell?

A. Yes, sir.

Q. Did you see them some time in the month of February, 1906?

A. I did.

Q. Where did you see them?

A. I saw them at No. 1 police station house on 12th street northwest; also at police headquarters.

Q. You first saw them at No. 1?

A. I first saw Evans at No. 1 police station house.

Q. Confining yourself to Mr. Evans, will you state how it was you came to see him?

Mr. TAYLOR. One moment. If it is proposed here to bring in a certain alleged confession, I object. I want to object to this, and I desire the jury to retire, if that is the object of the testimony. Is it?

Mr. MCNAMARA. I propose to, before we get through.

Mr. TAYLOR. Certainly, as to the confessions. I ask that the jury retire at this point.

The COURT. Yes; if they are going into that subject now.

Mr. TAYLOR. I know they are going into that subject. I am certain of it.

The COURT. Do you want to discuss the propriety of asking him such questions, or what is it you want to discuss before the Court?

Mr. TAYLOR. I want to object to certain alleged confessions, your honor, that this witness is no doubt called with reference to.

The COURT. Is there anything else you want to ask before you get on to that subject?

Mr. MCNAMARA. Yes, there are a good many things. I had not come to that yet. Counsel was ahead of his place.

The COURT. Very well.

By Mr. MCNAMARA:

Q. Did you know Mr. Morris J. Holloran?

A. I did not know him before he was assaulted.

Q. You did not know of a man by that name?

A. No, sir; I did not.

Q. I mean after he was assaulted?

A. I did.

Q. And do you remember when he died?

A. He died on the night of the 11th of February, 1906.

Mr. TAYLOR. Now, that is hearsay. The proof is that he died at the Soldiers' Home. You were not there, were you?

The COURT. You proved about the death.

The WITNESS. I went to the Soldiers' Home, Mr. McNamara, and saw him.

Mr. TAYLOR. You saw him after his death.

By the COURT:

Q. You were not there when he died, were you?

A. No, sir.

The COURT. The objection is sustained.

By Mr. MCNAMARA:

Q. On this first occasion when you saw Mr. Evans, I will ask you if Mr. Evans was under arrest.

A. He was.

Q. Who arrested him?

A. Mr. Mullin and Mr. Vermillion, on information furnished by me.

Mr. TAYLOR. Never mind.

By Mr. MCNAMARA:

Q. Did you have any part in the arrest?

A. I did, sir—not in the actual arrest.

Q. Did you have any part in any work leading up to the arrest?

A. I did, sir.

Q. You were engaged on the case?

A. Yes.

Q. For how long?

A. For three days.

Q. What was the date of the arrest, if you know?

A. The 15th of February, 1906.

Q. Where was he then?

A. He was found on Pennsylvania avenue, between 10th and 11th, in a barroom.

Q. Were you present when he was found?

A. No, sir; I was not.

Q. The first time you saw him was when, after that?

A. The same night of his arrest.

Q. That was at number 1 station house?

A. No. 1 police station house.

Q. Prior to that time had you made any visit to his house?

A. I had, sir.

Q. Where was his house?

A. 307 Missouri avenue northwest.

Q. Was he there?

A. It was not his house, but where he roomed.

Q. Was he there?

A. No, sir; he was not.

Q. Was anybody there?

A. Yes, sir.

Q. Without stating anything that was said now, will you state if you did anything, and what?

A. On information received——

Mr. TAYLOR. I object.

By Mr. MCNAMARA:

Q. You need not state what anybody told you.

A. No, sir.

Mr. TAYLOR. I object. He said he went to the house and found the defendant was not there.

Mr. MCNAMARA. The only purpose is to prove the finding of the shoes.

Mr. TAYLOR. One moment. He is telling what he will prove later.

16 Mr. McNAMARA. My proffer of evidence is, leaving out what anybody may have said at the house, to prove the result of the visit to the house.

The COURT. You are going to ask if he found something there.

Mr. McNAMARA. Yes.

The COURT. Let him answer.

By Mr. McNAMARA:

Q. Did you find anything there?

A. I did.

Q. What?

A. A pair of shoes.

Q. What kind of shoes?

A. Douglass shoes, leather lined, with the straps cut off at the back. They had the straps cut off.

Q. The straps were cut off?

A. Yes.

Q. After finding the shoes, when did you see Evans?

A. Possibly about two hours, not over two hours and a half, afterwards.

Q. When you saw him, did you have any conversation with him?

A. I did, yes.

Q. Did you have any conversation at any other or later date than this time?

A. I did, sir.

Q. How many conversations in all did you have with Evans?

A. Oh, I suppose four or five.

17 Q. Coming back to this first conversation, which you say occurred after you found the shoes, who was present?

A. Lieutenant Moore, who is now deceased, Sergeant Lee, Detectives Bauer, Mullin, McDonald, and Sanford.

10 By the COURT:

Q. They were all officers, were they?

A. Yes, sir; and one station keeper was in there. There were two or three more possibly that I can not quite recall just at this moment.

By Mr. McNAMARA:

Q. Did you have the shoes there with you?

A. I did, sir.

Q. Did you show the shoes to Evans?

A. I did, sir.

Mr. TAYLOR. One moment. Well, he has answered.

By Mr. McNAMARA:

Q. Did he say anything to you?

Mr. TAYLOR. I object.

By Mr. McNAMARA:

Q. Just yes or no.

A. Shall I answer?
Mr. TAYLOR. Yes or no.
The COURT. You need not say what it was.
The WITNESS. Yes.

By Mr. MCNAMARA:

Q. Did you ask him a question?
A. I did, sir.
Q. In the course of asking that question, did you extend
18 to him any promise——
Mr. TAYLOR. One moment. Wait.
Mr. MCNAMARA. Wait until I finish the question.
Mr. TAYLOR. I do not want you to finish the question, because we have come to the point where it is material to bring this matter before the Court in the absence of the jury.
The COURT. I will excuse the jury while you are discussing the matter.
(The jury thereupon retired.)
Mr. TAYLOR. Your honor, shall we go on with the confession?
Mr. MCNAMARA. It rests with you. You made the objection.
Mr. TAYLOR. I would like to ask the witness a few questions.

By Mr. TAYLOR:

Q. At the time you have named, on this occasion, is that the first occasion when you had the talk with Evans?
A. I beg your pardon, sir; I did not understand the first part of the question.
Q. The time, or occasion, when the district attorney asked you if you asked Mr. Evans any questions—I want to know if then, on that occasion, is the first time when he made any statement to you about this occurrence.
A. No, sir; it was not.
Q. When before that, if at all, had he made any statement
19 to you about this transaction?
A. He had not made any statement to me.
Q. On this occasion, is this the occasion when he did make the statement to you?
A. Which one do you mean?
11 Q. The one the district attorney inquired about.
A. I do not understand you.
Q. On what occasion was it that you say you asked him the question?
A. I asked him the question the first time I saw him in the station house, and I am trying to state that, that he denied any knowledge whatever of this evidence.
Q. That is what I wanted the court to hear you say. What next?
A. The next time?
Q. I mean on that occasion, you say he denied any knowledge?
A. Yes.
Q. Who were present on that occasion?

A. Lieutenant Bauer and Mullin——

The COURT. Are those the ones you just told about?

The WITNESS. Yes.

By Mr. TAYLOR:

Q. The ones you have just named?

A. Yes.

Q. There was no alleged confession then, at that time. He denied any knowledge of this transaction?

A. Yes.

Q. When did you next see him?

A. An hour or an hour and a half afterwards.

20 Q. *When* did you next see him?

A. In the same place, where he was.

Q. Who were present then?

A. The same people.

Q. Did you ask him any questions then?

A. I did, sir.

Q. Did he make any statement then?

A. He did, sir.

Q. In addition to those you have named, was not Assistant District Attorney Harvey Given there?

A. No, sir.

Q. Was that statement that he made taken down?

A. Not then, it was not.

Q. But the statement which he made then was taken down later?

A. No, not the statement he made then, but the statement he made later was taken down at the time he made it.

Q. He made a statement on this occasion in the presence of these people, and it was not taken down?

A. No, sir.

Q. When did you next see him? That was about two hours after the first?

A. The following day I saw him again.

Q. Who were present then?

A. The same officers, and Captain Boardman was present then.

Q. Did he make a statement then?

A. He did.

21 Q. Was it reduced to writing?

A. It was.

Q. Were these same officers all present then?

A. I know Mullin and Moore were present, and Bauer was present. I would not be quite sure whether Sergeant Lee was present or not. I will not be quite sure, but I think he was. That is my recollection of it.

Q. Was — the second or third statement he made?

A. The last one he made.

Q. Was it the second or third, in point of number?

A. He made only two statements, one oral.

Q. Then it would be the second statement he made?
A. No; it would not. I say he made only two statements altogether.
12 Q. Well, we will call it the last statement.
A. Yes.
Q. That was written down, was it?
A. Yes.
Q. How was it taken?
A. A stenographer took it down.
Q. In his presence, and in the presence of you people?
A. Yes.
Q. Then what did the stenographer do with it? Was it a man or a woman that took it down?
A. A man.
Q. Then what did he do?
A. I suppose he——
22 Q. Well, he took it away with him, did he not?
A. I suppose so.
Q. And then he brought it back to you typewritten, did he not?
A. Yes, sir.
Q. Who was that stenographer?
A. Mr. Cole, I think.
Q. Did Evans sign that statement?
A. He did.
Q. He signed it in the presence of all you people?
A. Yes, sir.
Q. Did you tell Evans, in effect, that his going to Court at all could be obviated by making the statement; that you would go to Court and testify yourself?
A. How is that?
Q. Did you tell Evans on that occasion when he made the statement that you would be a witness in Court, that you would come to Court and testify on his behalf, or rather testify to what he had to say?
A. Did you say "obviate?"
Q. I ask if you told him that.
A. Repeat the question, please.

The stenographer read as follows:

"Q. Did you tell Evans, in effect, that this going to Court at all could be obviated by making the statement; that you would go to Court and testify yourself?"
A. How is that?
"Q. Did you tell Evans on that occasion when he made the
23 statement that you would be a witness in Court, that you would come to Court and testify on his behalf, or rather testify to what he had to say?"

The WITNESS: I did not tell Mr. Evans either one.
Q. You did not tell him you would come to Court and testify?

A. Oh, yes; but not the way you put the question.

Q. You told him you would come to Court and testify?

A. I did.

Q. Then on that occasion you asked him if he knew anything about this transaction, and he said no, sir, did he not?

A. No, sir; he did not.

Q. He did not say that?

A. No, sir; he did not.

Q. Did you ask him this question: "Do you know what you are arrested for," and he said "No, sir?"

A. I did.

Q. Did you ask him: "You don't know anything about what you are arrested for," and he said "No, sir;" or words to that effect?

A. No, sir; I do not think it was words to that effect.

Q. Did you make this statement to him? Did you address yourself to him and tell him this——

A. You have the wrong paper, Mr. Taylor.

Q. Well, I find I have. "Evans, you are arrested and locked up here on the charge of murder." Was that the first time you told him that?

A. No, sir.

13 Q. Had you told him that before?

A. I had, sir.

24 Q. At the time you made this statement, did you correctly record his answer that he knew nothing about the transaction?

A. No, sir.

Q. Did he not say at the time this was written out that he did not know anything about it, at first?

A. No; he said he knew he was arrested on the charge of murder at the time you are speaking of.

Q. I want to know if you did not make this statement to him before he said anything: "Evans, you are arrested and locked up here on the charge of murder. I will tell you what the charge grew out of. On the night of the first of this month, or on the morning of the second, early on the morning of the second, possibly in the neighborhood of 12 o'clock at night time, you and somebody else, I don't know about them yet, but you were with a man named M. J. Holloran, who was at that time an inmate of the Soldiers' Home, a man with a small black beard, and wearing a uniform of the Soldiers' Home, a short box coat, with brass buttons." Did you tell him that?

A. I did.

Q. Did you tell him this: "You were with him on Ohio avenue between 12th and 13th street northwest. You took his shoes off his feet. He was found on Ohio avenue, between 12th and 13th streets northwest, about one o'clock on the morning of the 2nd, and

25 brought to this station house without any shoes on his feet." Did you tell him that?

A. I did, sir.

Q. Referring to Holloran, you say: "His face was covered with blood, with a wound in his head." Did you tell him that?

A. I did, sir.

Q. "He was carried to the Emergency Hospital and treated by the doctors there." Did you tell him that?

A. I did.

Q. "On the night of February 11, 1906, he died." You told him that, did you?

A. I did.

Q. "The autopsy showed he died from a wound in his head. I am going to ask you to tell me about it. What you say to me I will testify to under oath. You don't have to say anything to me that you don't want to. Do you want to talk?" Did you say that to him?

A. I did, sir.

Q. I want to know who all were present when you said that to him.

A. Lieutenant Moore, Detective Mullin, Baur, Sergeant Lee, Captain Boardman, and possibly two or three other officers that I cannot recall just at this moment, and the stenographer.

Q. This was the third time you interviewed him. The first time you said he said he did not know anything about it, the second time he made a statement, and the third time was the time you wrote it down; is that right?

26 A. If I may be permitted to explain to the Court how I interviewed him the first time——

Q. We will come to that later. Answer my question.

A. What is it?

Q. I say the first time you talked with him he denied knowing about it; the second time he told you something; and the third time, in point of interviews, was the time you wrote down this statement?

A. Yes, sir; I believe you are right.

14 Q. Had he counsel at the time?

A. No, sir.

Q. Did you ask him if he wanted counsel?

A. I did, sir.

Q. And he said he did not know any, did he not?

A. He said he did not have any money and could not employ any counsel. He told me that in the station house.

Q. That was while he was a prisoner?

A. Yes, sir.

Q. In the station house, when you questioned him each time?

A. Yes.

Q. Were any of his friends there to see him?

A. Yes; there was one of his friends down to see him—his common-law wife.

Q. Who is that?

A. Miss Ida Evans.

Q. Had she seen him out of your presence?

A. That I cannot say. She saw him with me.
Q. Why can you not say?
A. I don't know.
27 Q. You were there?
A. Not all the time.
Q. Were you there when she came?
A. I was when she came one time.
Q. I am speaking of this time, or any time prior.
A. This was prior to this time.
Q. While you were there had she talked with him about counsel in your presence?
A. I couldn't say.
Q. Was she permitted to talk to him when you were present?
A. She was, and at any time.
Q. I will ask you if she did, if you know, talk to him.
A. I do not. We asked her if she could employ counsel for him, and she said she had no money and could not.
Q. He had no counsel?
A. He had none at the time I saw him.
Q. You came and interrogated him?
A. Yes.
Q. And asked a series of questions?
A. Yes.
28 Q. He said nothing except what he said in response to your questions, did he?
A. Yes; he made a voluntary statement.
Q. One moment. He said nothing except what he said in response to your questions?
A. I don't know how you can construe that.
Q. Was anything written out by the stenographer that he did not say when he was making the statement to him?
A. Was anything written out by the stenographer that he did not say when he was making the statement?
Q. Yes; that he did not say.
A. I am not the stenographer.
Q. I will ask you if you observed anything in the paper when it was brought back to you that Evans had not said before the stenographer went out?
A. I do not think there was.
Q. Let me ask you this in the presence of the Court. Did Mr. Evans say this before the stenographer went out to write it out: "The above is true to the best of my knowledge and belief, and is voluntarily made, no promises of leniency having been made to induce me to make and sign this statement." Is that the language of Mr. Evans?
A. To the best of my recollection.
Q. He originated that statement of leniency, did he?
A. Now, Mr. Taylor——

15 Q. Oh, just answer the question.

Mr. McNAMARA. Let him answer.

29 Mr. TAYLOR. It is apparent, I will suggest to the Court, the jury not being here, that here is language of the character that Judge Hagner referred to when he spoke of a letter written by a poor ignorant old woman, which read "I write this letter without any suggestion, hoping that the action will be nolle prossed."

By Mr. TAYLOR:

Q. I want to ask you whose language this is: "The above is true to the best of my knowledge and belief"? Did Evans say that?

A. Mr. Taylor——

Q. Answer the question, yes or no.

A. I want to say to the Court——

The COURT. You can answer it yes or no.

The WITNESS. No, sir; that was not so.

By Mr. TAYLOR:

Q. Evans did not say that, did he?

A. I did not say that.

Mr. McNAMARA. Wait a minute. Let him follow up his answer and explain.

The WITNESS. I would like to make an explanation to the Court.

The COURT. He can make his explanation.

The WITNESS. I asked Evans if he wanted to make a statement, and he said he did. I told him then what Mr. Taylor had read there, that I would testify to what he would say, and what it might mean if he was convicted, and so on. After he made the statement I said to him "This is a voluntary statement, without any promise of immunity"——

30 By Mr. TAYLOR:

Q. Immunity?

A. Or words to that effect.

By the COURT:

Q. You put the words in his mouth?

A. Yes.

By Mr. TAYLOR:

Q. These are the words you gave him, and these are your words: "The above is true to the best of my knowledge and belief?"

A. Yes.

Q. You asked him to say that, did you not?

A. I did not ask him to say it.

Q. Did he say it?

A. Yes.

Q. You told him to say it, did you not?

A. No sir.

Q. What did you say to him about that?

A. I was talking to him in a general conversation about this case, and in that general conversation——

Q. One moment.

Mr. McNAMARA. Let him finish.

16 By Mr. TAYLOR:

Q. "The above is true to the best of my knowledge and belief."

A. Yes.

Q. Did you not put that into this writing and get him to sign it?

A. No; I did not.

31 Mr. McNAMARA. We should be fair to all parties. When the witness wants to explain an answer, I think he ought to be allowed to do it.

Mr. TAYLOR. The Court is present, and whatever he says goes.

Mr. McNAMARA. I ask the Court to aid me in having that done.

The COURT. The witness can explain fully.

The WITNESS. I wanted to be very fair to the defendant and I explained to him what it meant if he made a statement to me at all concerning this man's death, and what part he took in it.

Mr. TAYLOR. I want to make this suggestion to the Court: That this statement is reduced to writing, and I do not think it can be changed or qualified now by anything the witness may say, because your honor will be asked to determine whether the written statement will go to the jury or not.

Mr. McNAMARA. I have not asked anything of that kind.

(After argument.)

Mr. McNAMARA. I do not like to interrupt counsel, but if counsel is going to argue before we get through with the questions, I will have to decline to argue it at all.

Mr. TAYLOR. The question is on the admissibility of this confession.

Mr. McNAMARA. We have not finished with the questions.

32 Mr. TAYLOR. But we come to the confession, and I would like to say what I have to say about it, if it is agreeable to the Court.

The COURT. Mr. McNamara wants to ask some more questions.

By Mr. TAYLOR:

Q. In connection with this matter was Harvey Given there?

A. No, sir.

The COURT. When the document was written out, you mean?

The WITNESS. No, sir.

By Mr. TAYLOR:

Q. You were all police officers, the lieutenant and police officers?

A. Not in that instance. The one he alludes to, your honor, is another matter entirely.

Q. You did all you did here under the instructions of the district attorney's office?

A. I don't know—I could say this, in that matter. I did it under the instructions from the police department.

Q. In the case of O'Donnell, Harvey Given, the assistant district attorney, was present, was he not?

A. Yes; but that is not the case you are talking about.

17 Q. Was this paper prepared in the district attorney's office before you ever questioned this man?

A. It was not.

Q. You communicated with the district attorney's office,

33 and were advised, were you not, to make this statement to Evans?

A. No, sir; I did not communicate.

Q. Is not that substantially true?

A. No, sir; it is not true.

By Mr. McNAMARA:

Q. Is it in any wise true?

A. It is not in any wise true.

Q. As I understand the first conversation you had is not the one you have reported in the written memorandum?

A. It is not.

Q. What did the first one relate to?

A. The first conversation we had on information received prior to Evans' arrival—I had information, and on that information I sent what we call a general lookout for Mr. Evans, to cause his arrest.

34 Q. Did he make any statement or explanation or anything of that kind at that conversation?

A. He denied all knowledge of Holloran at that time.

Q. You got no information about that at that time?

A. No, sir.

Q. When was the next conversation?

A. About an hour or an hour and a half afterwards.

Q. Is that the conversation to which you referred here?

A. That was the conversation to which I referred here, only it was not taken down at that time.

Mr. TAYLOR. But it was taken down subsequently.

By Mr. McNAMARA:

Q. The questions you asked were the same you asked at that time?

A. About the same.

Q. Before you asked those questions, did you say anything to him, explicitly or expressly, to put him in fear?

A. I did not.

Q. Did anybody present do anything of that kind?

A. No, sir.

Q. Did you or anybody present say anything to him to extend to him any hope of immunity or leniency?

A. No, sir.

Q. Or any particular consideration?

A. No, sir.

Q. Did you then in any way hold out either a promise on
35 the one hand, or did you put him in fear on the other hand?

A. I did not do either.

Q. Did you explain to him the nature of this case——

Mr. TAYLOR. I think these questions are leading. He can say what he said to him.

Mr. MCNAMARA. I am now cross-examining him, Brother Taylor. The positions are reversed. Mr. Taylor jumped in and examined the witness, and I am cross-examining him.

The COURT. Go on.

By Mr. MCNAMARA:

Q. Did you explain to him the nature of the matter on which you were questioning him?

A. I did.

Q. State fully what you said to him?

18 A. I cautioned him. I told him he was charged with murder; that a man had died and I had information that he was the cause of his death; that it occurred on Ohio avenue between 12th and 13th, very nearly in front of 1221 Ohio avenue, and that my information was that he and another man—at that time I did not know the other man's name, but learned it afterwards—had killed this man that I was talking about—this dead man that I was talking about. I said "Do you want to say anything about it; do you want to talk about it; whatever you might say to me I will testify to under oath in court. You do not have to make any
36 statement to me if you do not want to. Do you want to say anything about it, or do you want to talk? He said "I do," and then he told me the story. That was the result of the information I had received.

Q. Was it after this conversation that you have just spoken about that you put those questions to him?

A. Yes, sir.

Q. And he answered them at the time?

A. Yes, sir.

Q. When that was finished, and you had gotten these questions answered, how did you come to use this last phrase: "The above is true to the best of my knowledge and belief, and is voluntarily made, no promises of leniency having been made to induce me to make and sign this paper?"

A. I asked him that. I said "You fully understand me when I tell you that if you make the statement to me, you are charged with murder, and I will tell what you say, and if you say anything concerning yourself, or the other party, whom I did not know at the time, but found out later on, it might be the means of hanging him."

Q. Will you tell us how you came to use the last part, where it says "The above is true to the best of my knowledge and belief?"

A. I asked him if it was true, and he said it was.

Q. "And is voluntarily made?"

A. I said "Has anybody, I, or anybody else, offered you any inducement to make this statement," and he said no.

37 Q. When the whole thing was completed, did he read it?

A. I read it over myself, and then I let him read it.

Q. Was it then that he signed it?

A. Yes; then he signed it.

Q. Did you have any other conversation previous to this, about the shoes?

A. I did.

Q. When did you have that?

A. The night of his arrest.

Q. That was the day before this?

A. The day before this statement was given.

Q. What was that conversation about?

A. He told me he had taken the shoes off of Holloran's feet, and that they were down in a little improvised closet that he had made, and that there was a curtain in front of it.

Q. Where?

A. At 307 Missouri avenue, second floor back.

Q. Did you go there?

A. I did.

Q. Did you find the shoes?

A. I did.

Q. In the place he told you?

A. Yes, sir.

Q. Did the shoes have straps on them?

A. No, sir.

19 Q. Did he make any statement in regard to that?

A. He did.

38 Q. What did he say?

A. He said he cut the straps off to hide identification.

Q. Putting the statement to you as I have put it all along, I will ask you, did you state that there was any hope, or put him in fear, or anything of that kind?

A. None whatever.

Q. Did you use the same caution in this case as in the other?

A. The same as the other. I talked to him at first, when I found he was arrested.

Mr. McNamara. That is all I care to ask him just now.

By the Court:

Q. This question that Mr. McNamara has just been asking about—was that in the presence of the other officers?

A. Yes, sir; I think there were four officers there. I can not quite recall all.

Counsel thereupon argued to the Court the question of the admissibility of the confessions referred to, of Charles Evans and Harry

O'Donnell, and at the request of the district attorney the decision of the Court is reserved pending the production of other authorities.

Mr. McNamara. Let it go over until to-morrow morning. I will withdraw this witness, and let it go over until to-morrow.

The Court. Have you any other witness?

Mr. McNamara. Yes.

39 Friday, *February 1, 1907—10.15 o'clock a. m.*

The Court met pursuant to adjournment.

Present, on behalf of the Government, Messrs. McNamara and Perry; on behalf of the defendants, Mr. Thomas C. Taylor.

The Court. I can not get out of the impression, looking at this document as it is here, that it does come within the prohibition of the Constitution. In some respects it is a voluntary statement; in other respects it is purely the result of leading questions that were put to this witness. It is taken in the form of a deposition. The question of what he did is part of his deposition. He admits doing some things, and then, in another part of it, he denies doing some things, and admits some incriminating facts. In the first place, it is not a confession of the crime that these parties are indicted here for. It is only a deposition in regard to certain facts that might incriminate them if substantiated by proof; and while it is said that they were notified, the paper contains these statements, what Mr. Hartigan, the detective, said in regard to the right of the defendant here to refuse to talk. Then, after reciting the alleged facts that he has ascertained from somebody else connected with him in this matter, then it says: "I am going to ask you to tell me about it. What you say is being testified to under oath. You don't have to say anything to me that you don't want to. Do you want to talk? A. Yes, sir." Then the paper goes on here, question after question, and answer, in the
20 form of a deposition. Several of the questions are leading questions, purely leading questions, and the answer that is sought for is not extracted until the leading questions are answered. Then it closes with "This statement is true, to the best of my knowledge and belief and is voluntarily made, no promise of leni-
40 ency having been made to induce me to make this statement." Evidently those words are put into the defendant's mouth, and he was asked to include them in his statement. And, taking the whole matter together, the impression that I get from it is that this man was made—an attempt was made to make him be a witness against himself, and that, in the absence of counsel, without any counsel being there to represent him at all.

Now, we have a statute on the subject, which is familiar to all of you, of course: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness."

Now, that would apply, of course, in the case of a trial. But that, of course, applies only in trials where parties are indicted and brought into court. And it says that it is in conformity with the Constitution; that it requires and says that every person charged with crime shall not be required to incriminate himself, and that goes on the question of trial. The language of the Constitution itself, in article 5, with which you are all familiar, says: "Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life or liberty or property, without due process of law," and so forth. But, of course, that, you might say, would be in the trial of a case. And then, in another article, article 6, "In
41 all criminal prosecutions"—which it is not necessary perhaps to be given any weight until an indictment is found and there is a criminal prosecution—"in all such cases the accused shall enjoy the right to a speedy and public trial, by impartial jury," and so forth, and then he shall have the right to have compulsory process for obtaining witness in his favor, and to have counsel for his defense. It may be argued that those only apply to the man after he is put on trial. It seems to me the principal of it is involved in this case here. Here is a man who is arrested charged with murder, if that is the charge that is talked about, and the facts are recited, and then, by some process or other, either voluntarily or otherwise, after having denied having any knowledge of the matter at all, he is asked certain questions and made to detail certain facts that might incriminate him, not that he confesses that he is guilty of the crime, or anything of that kind, in the paper, but certain depositions are taken, questions asked and answers taken of certain alleged facts from which the jury may be asked to infer that this man did commit a crime. It seems to me that it comes clearly within the prohibition. The man certainly ought to have had counsel before undertaking anything of this
21 kind. I don't see the necessity for the officers undertaking to get the confession out of him. They had some ground for arresting him and holding him, but it is not necessary for me to criticize the officers about it.

It seems to me that this is a question where it ought not to be allowed to come in as a deposition in the case against the very
42 man who made it. It is against the Constitution and this statute that I have read.

Also, in sustaining the defendant's objection to the admission in evidence of these alleged confessions, the court takes into consideration the state of the evidence on behalf of the Government, especially that there is not evidence yet in the case tending to show that the defendants or either of them at any time assaulted the deceased with the *purpose to kill*, nor is there any proffer by the Government of any evidence upon this material point, nor is there anything in the alleged confessions even if admitted, tending to show that the defendants or either of them assaulted the deceased with a specific *purpose to kill*.

Further, the court also takes notice of the state of the evidence in respect of the alleged cause of death of deceased, there being no suffi-

cient evidence in the case to warrant the jury in finding beyond any reasonable doubt that the defendants or either of them inflicted upon the deceased the injury which the evidence shows was the immediate cause of death, nor was there any proffer by the Government of further proof upon this point.

Mr. McNAMARA. Now, I presume, your honor, that that ruling applies equally to the O'Donnell confession too?

The COURT. Yes; as far as I saw it.

Mr. McNAMARA. Now, your honor will recall, that, with Mr. Taylor's precipitance, we were unable to offer these in evidence or to get to that stage. In order to keep this record straight, so that we may save our rights on appeal, I would like to make when the jury
43 returns a formal offer of the paper of this instrument, and have the ruling of the court and have our exception noted explicitly at the time. Do I understand that these confessions are rejected on the ground that they were involuntary, or that they are not proper confessions but merely quasi admissions?

The COURT. Well, I don't think that they are sufficiently shown to be the voluntary statement that is required, and, furthermore, I don't think that they are confessions that are referred to in the authorities on that subject. While they are confessions of certain facts, in this case I am obliged to hold that I think that the admission of these papers would be making the defendants witnesses against themselves in this proceeding involuntarily.

Mr. McNAMARA. Not that there is any evidence of duress or intimidation, but the fact——

Mr. TAYLOR. One minute. Now, he asks permission to offer these in evidence when the jury comes in, and I will make my own objection. I don't need Mr. McNamara to make the objection. I will make it, your honor, and make it specifically upon this record.

Mr. McNAMARA. Now, to continue, I wanted to, simply for
22 the sake of guiding my own and Mr. Perry's conduct, ascertain if the fact is that these confessions did not exhibit any evidence of duress or intimidation?

The COURT. I think I have stated it as definitely as I care to. I get the impression that they are not competent under the authorities on confessions, under the Constitution and criminal statutes.

Mr. McNAMARA. There is another matter, and that is the
44 evidence that certain articles were found in response to certain statements which were made, would that also be covered by this decision?

The COURT. I think not. I think that would be competent, the statements that were made in a different way from this.

Mr. McNAMARA. So it will then be understood then that these questions which have been asked yesterday of the witness Hartigan shall have been asked in respect to these particular documents which I shall offer when the jury returns, so that all our rights are saved in connection with that, and Mr. Taylor can then object and the court can rule, and we can have our record straight.

Mr. TAYLOR. Anything that he has said that he did in consequence of any confession is not objected to. What he said yesterday was that he got a pair of shoes in consequence of something that was told him.

The COURT. That is what I referred to.

Mr. TAYLOR. Now, I don't think I objected to that.

The COURT. The ground, of course, for the refusal of the confession as a confession is its unreliability. It must be clearly shown that it was a voluntary statement, without any pressure or any inducement to make it at all, in order to make it reliable as evidence at all. I am not able to free my mind from an impression in regard to this paper, that it is such a paper as that—such a confession as that.

Mr. TAYLOR. I wish, your honor, to put an objection upon the record when the jury comes in.

The COURT. Yes.

45 (At this point the jury returned to the court room and took their seats in the box.)

By Mr. MCNAMARA:

Q. Mr. Hartigan, I asked you yesterday if, after the arrest of Mr. Evans, you had a conversation with him?

A. I did, sir.

Q. Did you have any other conversation than that one at that time?

A. I did.

Q. When was the second conversation?

A. On the morning following.

Q. Was that the only conversation you had?

A. No, sir.

Q. Did you have a third?

A. I did.

Q. When?

A. On the same day.

Q. How far apart from the second?

A. About two hours.

Mr. MCNAMARA. Now, in order to save this matter, I pre-

23 sume that we can stipulate that these questions which we have gone over have been asked in regard to that second and third conversation?

The COURT. The third was where this document was written, what he said yesterday.

Mr. TAYLOR. Yes, sir.

By Mr. MCNAMARA:

Q. Now, I show you a paper dated February 16, 1906, pur-

46 porting to be signed——

Mr. TAYLOR. Don't say who signed it.

Q. (Continuing.) With your name and four others as witnesses on four sheets of typewritten paper, and ask you when that was prepared, when signed—just state the date?

Mr. TAYLOR. The paper must speak for itself, your honor.

The COURT. He can state the date.

Mr. TAYLOR. I thought the date was on it.

The COURT. He can state the date, if he can.

A. February 16, 1906.

Q. At which one of these conversations was that paper prepared and signed?

A. At the third conversation I had with him. I will state, Mr. McNamara, the first time I saw him, including the first conversation or alleged conversation, I had only one or two words to say to him; he was drunk, and I decided to wait until the following morning to talk to him.

Mr. TAYLOR. Now, let me see it before you offer it.

Mr. MCNAMARA. I want the record to show explicitly that the preliminary qualifying questions put to this witness at some length were put prior to the time that this paper was prepared and signed.

Mr. TAYLOR. There is no objection to that; the record, as it stands, your honor, is the record. That is all there is of that.

The COURT. Yes.

Mr. MCNAMARA. Now, I offer this in evidence, as the confession of the party who signed it, Charles R. Evans.

Mr. TAYLOR. I object to it, your honor, to the admission of
47 this alleged confession in evidence of Evans here: First, because, upon its face, it invades the constitutional right of the defendant in that it does not show upon its face that it was a voluntary statement; second, because this issue joined here is a charge of murder, and this alleged confession does not bear at all—is not relevant at all upon the question of the cause of death, or the purpose to be imputed to either of these defendants, or to this defendant, in making any alleged assault. In other words, there is no evidence yet in this case indicating or tending to show that these defendants, or either of them, assaulted the deceased with the purpose or intent—specific intent or purpose to kill. And, again, I object, further, upon the ground that as yet there is no evidence in this case which would justify this jury in finding that these defendants, or either of them, inflicted the assault which caused the death of the deceased;
24 third, upon its face it shows that the accused was without counsel and that he originally denied any knowledge of this transaction, and for some reason was induced to make this deposition; fourth, because the witness on the stand, Mr. Hartigan, testified that the accused, at the time of making this deposition or statement, was under arrest and in prison, and for other reasons which are apparent upon the paper itself.

The COURT. Well, I will sustain the objection and exclude the paper.

Mr. TAYLOR. Now, I make the same objection to the other.

Mr. MCNAMARA. And the court makes the same ruling.

The COURT. Yes.

Mr. MCNAMARA. And to that the Government notes its exception.

48 Mr. TAYLOR. And in the other case, too?

Mr. MCNAMARA. Yes, sir; and I ask that this be spread upon the record for the purpose of saving it.

Mr. TAYLOR. No objection.

(The paper referred to is as follows:)

Statement of Charles Evans before Detective-Sergeant T. P. Hartigan, February 16th, 1906.

Detective HARTIGAN. Evans, you are arrested and locked up here on the charge of murder. I will tell you what the charge grew out of. On the night of the first of this month, or on the morning of the 2nd; early on the morning of the 2nd—possibly in the neighborhood of 12 o' clock at night time—you and somebody else—I don't know anything about that yet, but you were with a man named M. J. Holloran, who was at that time an inmate of the Soldiers' Home, a man with a small black beard and wearing a uniform of the Soldiers' Home—a short box coat, with brass buttons. You were with him on Ohio avenue between 12th and 13th streets NW. You took his shoes off his feet. He was found on Ohio avenue between 12th and 13th streets NW. about 1 o'clock on the morning of the 2nd and brought to this station house without any shoes on his feet; his face covered with blood, with a wound in his head. He was carried to the Emergency Hospital and treated by the doctors there. On the night of February 11th, 1906, he died. The result of the autopsy showed he died from a wound in the head. I am going to ask you to tell me about it. What you say to me I will testify to under oath. You don't have to say anything to me that you don't want to.

Do you want to talk?

49 A. Yes, sir.

Q. Where did you meet this man?

A. Right in front of Mr. Cannon's saloon.

Q. What time did you meet him?

A. I don't know exactly what time.

Q. About what time?

A. About 11 o'clock.

Q. At night?

A. Yes, sir.

Q. What night?

A. I don't know exactly what night it was.

Q. Can't you try and recall the night?

A. No, sir; I don't exactly remember.

Q. Was it the night of February 1st?

A. Yes, sir; I believe it was; I am not exactly sure.

Q. Where did you go?

A. He came there where I was looking in the window, and

25 I stood and talked to him awhile.

Q. Who was with you at the time?
A. No one.
Q. What was his conversation with you as well as you remember?
A. He says, "How was the show at the theatre; come on and we will walk up that way."
Q. What was his condition?
A. He was drunk, the same as I was.
Q. Then where did you go?
A. From there we went around by Harvey's, and around that way.
Q. What do you mean by around that way—turned on what street?
A. Went south on 11th street to C, and down 11th to Ohio avenue, then up C, and we stopped there on the corner a little while and talked.
Q. On the corner of 11th and C?
A. Yes, sir. He says come on and go around to this house.
Q. What house?
A. Nellie Carpenter's. I went around there with him.
Q. Then what did you do when you got to Nellie Carpenter's?
A. We stopped and he says wait a minute I want to urinate, and sit down on a pile of lumber. Then this other fellow came down the street.
Q. What other fellow?
A. This fellow I told you about last night.
Q. What is his name?
A. I don't know his name.
50 Q. Can't you recall his name?
A. No, sir; I never heard anybody call his name.
Q. Would you know his name if you heard it?
A. I think I would.
Q. Was it Brown?
A. No, sir.
Q. Was it a man named Smith?
A. No, sir.
Q. Was it a man named O'Donnell?
A. I don't know what his name was.
Q. Was it a man named Harper?
A. No, sir.
Q. How long had you known this man?
A. About a week.
Q. Where did you become acquainted with him?
A. Pennsylvania Railroad depot.
Q. How did you meet him?
A. I went down there one day and went in the toilet to urinate, and came back and went in the smoking room, and made a cigarette, and went across over to the window and he was standing there.
Q. Don't they call him "Scotty?"
A. I don't know.
Q. Isn't his name O'Donnell?

A. I don't know.
Q. Don't they call him "Chick?"
A. I don't know.
Q. That is the fellow, the one you were talking about in the depot, he was the one that was with you on Ohio avenue?
A. No, sir. It was a slim fellow. I went over to the window and this Fred was standing in the corner and this little party said to him, "Who was that?" and Fred told him it was Edith Evans.
Q. Where does she live?
A. She lived down at the house, at my rooms; she had a fuss with them and left there.
Q. After he joined you there, what did you do then?
A. Went back and met this man, the man that sat down on the pile of lumber.
Q. And then what happened?
A. He went through his pockets, and I took them off his feet.
Q. Those shoes?
A. Yes, sir.
Q. Took them off this man's feet that you carried around from Cannon's on the Avenue to 12th and Ohio avenue?
A. I didn't carry him around there; I went with him.
Q. How did you take them off?
51 A. Untied them.
Q. Did you have any trouble in pulling them off?
A. Little bit; one of them was hard to get off.
Q. And those are the shoes that you took off his feet?
A. Yes, sir.
Q. This other man, that you can't recall his name, you say he went through his pockets and took what money he had?
A. Yes, sir; I don't know whether he got any money or not. I asked him if he got any and he says he didn't.
Q. Did you strike that man?
26 A. No, sir; I did not.
Q. Did you knock that man down?
A. No, sir; I did not.
Q. I mean the man that you took the shoes off of?
A. No, sir; I did not.
Q. Didn't you hit that man?
A. No, sir; I did not.
Q. How did he get the wound on his head?
A. I don't know; he had no wound on his head when I left him.
Q. Did he have any wound on his head when you first met him.
A. Not that I know of.
Q. Did he have any blood on his face?
A. No, sir.
Q. Any blood on his collar?
A. No, sir.
Q. Any blood on his shirt?
A. No, sir.

Q. Was there any sign of blood anywhere on him?
A. No, sir.
Q. After you took the shoes off his feet, did you notice his feet?
A. No, sir; I did not?
Q. Did you notice whether one sock came off with his shoes or not—off one foot?
A. No, sir.
Q. Do you remember having one of his socks?
A. No, sir.
Q. You don't remember taking off his stockings or socks?
A. No, sir.
Q. Were the shoes new?
A. Just as they are now.
Q. You have worn them since?
A. No, sir; I have not.
Q. Your wife——
A. I tried them on, but they hurt my feet.
Q. Your wife, Mrs. Mary Evans, says you wore them for almost a week?
A. I did not.
Q. You say that the other man who met you on Ohio avenue went through his pockets?
A. Yes, sir.
52 Q. You do not know who that man is?
A. No, sir.
Q. How old a man would—say this man is?
A. 23 or 24 years old.
Q. How tall is he?
A. Not quite as tall as me.
Q. How stout is he?
A. He has got pretty good shoulders on him; not very stout.
Q. Stout as you are?
A. No, sir.
Q. How much does he weigh?
A. 140 or 150 pounds.
Q. What is the color of his hair?
A. Black.
Q. What is his complexion?
A. Light.
Q. Any marks or scars or anything on his face?
A. I never noticed any.
Q. Smooth face?
A. Yes, sir.
Q. After you took the shoes off this man's feet, and this man you are describing went through his pockets, what did you do then?
A. I went on down Ohio avenue.
Q. What became of the man that was with you?
A. He walked on with me down towards the Majestic Theatre.

Q. Evans, isn't it true that when you took this man- shoes off and the man that was with you went through his pockets he woke up, and you struck him? Isn't it true when he woke up you struck him in the head?

A. When I took his shoes off he got up, and I hit with a small block of wood.

Q. What did the other man do that was with you at the time?

A. He stood there with me.

Q. Did he hit him?

A. No, sir; he did not.

Q. You hit him with a block of wood, and then did he fall back on the lumber pile?

A. I hit him with this small block of wood and he staggered and fell up against the lumber pile.

Q. How long was that block of wood?

A. About that size (indicating about 8 or 10 inches).

Q. Did you hold it in your hand and hit him, or throw it at him?

A. I fired it at him (illustrating).

Q. You hit him in the head?

A. Yes, sir.

Q. He staggered and fell down?

A. He fell up against the wood pile; did not fall down.

53 Q. Then you both went away?

A. Yes, sir. From there we went right straight down Ohio avenue to 10th street and went out towards the Majestic Theatre.

Q. What time was this?

27 A. A little after 12 o'clock.

Q. Where did you separate?

A. He left me at 9th and Pennsylvania avenue.

Q. Where did you go?

A. I went home.

Q. Where did you have the shoes?

A. Under my arm.

Q. Did you put them on that night at all?

A. No, sir.

Q. Did you say anything to your wife when you went home about what you had done?

A. No, sir.

Q. Anybody else?

A. No, sir.

Q. Have you seen this other man since?

A. Yes, sir; they had him over here the other day; one of the officers had him; I was across the street in a mail wagon.

Q. Have you seen him since?

A. No, sir.

Q. Where did you first meet this man that helped you to commit this robbery?

A. In the house there.
Q. What house?
A. No. 1221 Ohio avenue, Nellie Carpenter's.
Q. Evans, have you tried to sell these shoes to anybody since you got them?
A. No, sir.

The above statement is true to the best of my knowledge and belief, and is voluntarily made, no promises of leniency having been made to induce me to make and sign this statement.

CHARLES R. EVANS.

Witness:

THOMAS P. HARTIGAN.
LIEUT. JAMES A. MOORE.
CHAS. MULLEN.
FRANK BAUR.
EDWARD CURRY.

54 And thereupon the Court sustained the objection of counsel for the defense and refused to admit the foregoing paper purporting to be a confession of defendant, Charles R. Evans, in evidence before the jury, to which ruling counsel for the United States then and there noted an exception, which was duly allowed by the Court.

And in order to further maintain the issues involved in the above entitled cause, the testimony of the witness Thomas P. Hartigan was continued:

55 By Mr. MCNAMARA:

Q. Did you have a conversation with Mr. Harry O'Donnell?
A. I did, sir.
Q. What time?
A. About one o'clock in the day, possibly.
Q. Of what day, do you remember?
A. The 16th of February.
Q. Where?
A. In the first precinct station house.
Q. Did you have any other conversation with him?
A. I did, sir.
Q. How many?
A. One there.
Q. And what day did that happen?
A. I was not present during all of that.
Q. Now, I show you a paper, two sheets of typewriting, purporting to be dated February 16, 1906, and unsigned and ask you at which of these conversations was that paper prepared or those questions answered as purporting to be therein?

A. The second conversation, the same day.

28 The COURT. That is not signed?

Mr. MCNAMARA. Not signed; no.

Mr. MCNAMARA. Now, it may be necessary to go a little further with this one, but I suppose it is admitted that all the questions asked in the other case were also asked in this?

Mr. TAYLOR. Yes.

Mr. MCNAMARA. And the same objection applies to this one that applied to the other confession?

Mr. TAYLOR. I expect so, yes; unless the Court wants to

56 make his own objections. I object on the grounds that I have named in the other case. There is an additional objection, I think, that I will point out directly.

By the COURT:

Q. Mr. Hartigan, this was not taken down in typewriting at the time of the conversation?

A. It was taken down in shorthand by a stenographer.

Q. And then put in typewriting by the stenographer?

A. Immediately thereafter.

Q. It was afterwards presented to the defendant?

A. It was.

Q. And he didn't sign it?

A. We didn't ask him to sign it.

Q. What was it presented to him then for?

A. Read it to him to see if it was true. Mr. Given, of the District Attorney's office, was there at the time.

The COURT. You make the same objection?

Mr. TAYLOR. Yes; and I make the further objection——

Mr. MCNAMARA. Before you object to that, we had better stipulate that those are the questions and answers that this witness would say, and that they were asked and answered.

Mr. TAYLOR. Yes; that is stipulated.

57 Mr. TAYLOR. I want to make the further objection—Mr. Stenographer, you put all the objections in this case that I have put in the other—I want to make the further objection that this is not a paper which at all tends to implicate O'Donnell in respect of any crime, and further because it shows upon its face that if there was ever any illegal action contemplated by him, it expressly shows upon its face that he had abandoned it.

The COURT. I will make the same ruling and give you an exception.

Mr. MCNAMARA. And to that the Government notes an exception, if your Honor pleases.

(The first paper referred to was marked by the stenographer "P. E. B. 1," and the second paper "P. E. B. 2." The first paper

has already been copied into the record, and the second is as follows:)

29 *Statement of Harry O'Donnell before detective—Sergeants T. Hartigan, Frank Baur, Lieutenant James A. Moore, Ass't U. S. Attorney Harvey Given, Precinct Detective Mullen, and Policeman Curry, February 16th, 1906.*

Detective HARTIGAN:

Q. What is your full name?
A. Harry O'Donnell.
Q. How old are you?
A. 22 years old.
Q. Where were you born?
A. Washington, D. C.
Q. O'Donnell, you know that we are all police officers here?
A. Yes, sir; I do.
Q. You know what you are arrested for?
A. No, sir.
Q. Don't know anything about it?
A. No, sir.

Q. O'Donnell, you are arrested on the charge of murder. I will tell you what the charge grew out of. On the night of the first of this month, or on the morning of the 2nd—early on the morning
58 of the 2nd—possibly in the neighborhood of 12 o'clock at night time—you and somebody else were with a man named M. J. Holloran, who was at that time an inmate of the Soldiers' Home—a man with a small black beard, and wearing a uniform of the Soldiers' Home—a short box coat, with brass buttons. You were with him on Ohio avenue between 12th and 13th streets NW. He was found on Ohio avenue, between 12th and 13th streets NW., about 1 o'clock on the morning of the 2nd, and brought to this station house without any shoes on his feet, his face covered with blood, and a wound in his head. He was carried to the Emergency Hospital and treated by the doctors there. On the night of February 11th, 1906, he died. The result of the autopsy showed he died from a wound in the head. I am going to ask you to tell me about it. What you say to me I will later testify to under oath at your trial. You don't have to tell me anything if you don't want. Do you want to talk?

A. Yes, sir; I will tell you about it.

Q. On the first of this month were you on Ohio avenue between 12th and 13th streets NW.?
A. Yes, sir.
Q. About what time?
A. I could not tell you the time.
Q. Well, about what time?
A. About 11 o'clock.
Q. Did you see Charles Evans?

A. Yes, sir.

Q. Tell us what you and he did.

A. Well, this Evans girl told me to get her valise. I went down on Missouri avenue and got the valise and brought it up, and I was standing in the door, and this man, Charles Evans, called to me to come down there, and I says, "What in the hell do you want?" He says "come here." I walked down the street to where he was
59 and he says there is somebody up here wants to see you. I had money on me and I was afraid he wanted to get mine, and I told him that if they wanted to see me to come outside; then he says I have knocked a man stiff up here; he has got forty bucks on him, and he says lets rob him; I said, "Yes." I goes up with the intention of robbing the man, puts my hand on his head; seen the blood on my hand and it turned me. The man raised up while this man (meaning Charles Evans) was taking his shoes off. He (meaning Evans) hit him. That is his own statement. He hit him and we both went away. We went up Ohio avenue to 10th street, up 10th street to Pennsylvania avenue, down Pennsylvania avenue to 9th street, and I left him.

30 Sergeant BAUR:

Q. What did he hit him with when he raised up?

A. I don't know, sir.

Q. Did not see what he hit him with?

A. No, sir.

Q. What did this man do when he hit him—fall down?

A. The man was down already. When Evans was taking his shoes off he kinder raised up on his elbows and Evans hit him and he fell back.

Q. Did this man that was hit make any out-cry?

A. Not that I know of.

Q. Walking down Ohio avenue, did Evans ask you how much money you got?

A. He asked me if I got anything, and I answered him no.

Attorney GIVEN:

Q. You agreed with this man Evans to rob Holloran, did you?

A. Yes, sir.

Q. You went with Evans to where Holloran was for the purpose of robbing him?

A. Yes, sir.

Q. You and Evans did rob him?

A. I put my hand down on his head and coat and then seen the blood on my hand, and say "gee," I am going to get away from here.

Q. You did not put your hands in his pockets?

A. No, sir.

Q. But you say you went there for the purpose of robbing
60 him?

A. Yes, sir. I agreed with Evans to rob him.

The above statement is true to the best of my knowledge and belief, and is voluntarily made, no promise of leniency having been made to induce me to make and sign this statement.

_____ _____.

Witness:

_____ _____.

The COURT. I would like to state on the record another reason for this ruling that I did not state, but intended to state, before. In a capital case the effort to prove an admission by a defendant of some fact from which an inference is to be drawn is excluded where a confession of the crime itself is admitted; and some number of authorities hold to that effect—that an admission of some fact by which an inference might be drawn cannot be proven in a capital case by statements from the defendants, where a confession of the guilt of the crime charged might be proven.

Mr. PERRY. We would be willing, your honor, if your honor would be so pleased to admit the papers in evidence, to abandon the charge of murder in the first degree.

Mr. TAYLOR. Now, your honor, there is the statement made, in the presence of the jury, that he wants to abandon the charge of murder in the first degree. He wants to make a bargain here. I think that is entirely improper, now, and I ask your honor's permission—well, no; let it go.

Mr. PERRY. It was just simply to obviate that exception, your honor.

Mr. TAYLOR. You cannot make any bargain with me

61 The COURT. The rule would still apply to murder in the second degree, too—I think it would apply; I am not clear about it.

31 Mr. PERRY. Then we would withdraw that, sir.

Mr. TAYLOR. Why, your honor, that rule would apply, I take it, in any case, because an inference upon an inference is the principle involved here.

The COURT. Some authorities make a distinction between a felony and a capital case, and others do not. If it is a felony, they will not allow an admission of that kind to be proven by the defendant. So I do not feel as though I could make any different ruling about it. Are there any further questions of Mr. Hartigan?

Mr. TAYLOR. I want to make a suggestion, your honor. Do you not think it ought to appear upon this record that there is another objection—that the district attorney's office aided and assisted in extorting this confession?

The COURT. Well, you have got the testimony of the officer about it.

Mr. TAYLOR. One of these confessions or alleged confessions shows that Harvey Given, assistant district attorney, was there officiating.

The COURT. Yes; the witness so testified, I think.

Mr. MCNAMARA. Whatever there is in that far-fetched claim the confession itself shows.

Mr. TAYLOR. Well, then, let that be put in as another objection to that.

Mr. TAYLOR. Well, can I cross-examine this witness?

Mr. MCNAMARA. Take the witness; yes.

Mr. TAYLOR. Mr. Hartigan, I am much obliged to you. No questions.

62 Mr. MCNAMARA. I do not know whether I formally made the offer, but I want the record to show that I formally offer to prove by the three witnesses, who had to do with the three confessions, that they were the confessions of the defendant- Evans and O'Donnell.

The COURT. You mean to show the same facts proved by the detective.

Mr. MCNAMARA. No; the witnesses who came to testify as to the alleged confession. I want the record to show that they offered to prove that they were the confessions.

The COURT. Do you mean the witness who signed that paper? Only one of them was signed by a witness.

Mr. MCNAMARA. Yes; I want the witnesses Hartigan, Lee, and Miller to be on the record as offering to prove that the confessions which we sought to have them testify to were the confessions of the parties involved—the defendants.

Mr. TAYLOR. I object.

The COURT. One of the officers did so testify, and you say the others would have no doubt done so.

Mr. MCNAMARA. Yes, sir; they would have done so if they could be called under your honor's ruling.

The COURT. Very well.

Mr. TAYLOR. I enter an objection to your honor's ruling and note an exception.

32 The COURT. Let the exception be noted.

63 And thereupon the court sustained the objection of counsel for the defense and refused to admit the foregoing paper purporting to be a confession of defendant Harry O'Donnell in evidence before the jury, to which ruling counsel for the United States then and there noted an exception which was duly allowed by the court.

64 And in order to further maintain the issues involved in the above-entitled cause, after the foregoing evidence on behalf of the United States had been introduced and before any evidence for the defense had been introduced, counsel for the United States formally offered to enter a nolle prosequi of the charge made in the indictment in this case so far as the defendant Harry J. O'Donnell was concerned, and counsel stated that the proffer was made so that the defendant Harry J. O'Donnell could be placed on the witness stand as a witness on behalf of the Government. Objection was made by counsel for the defendants on the ground that an indictment for highway robbery was pending against the defendant Harry J. O'Donnell upon the facts involved in this cause and that the matter was entirely

within the discretion of the Court; and this objection was sustained by the Court, and the Court refused to allow the United States to enter a nolle prosequi as to the defendant Harry J. O'Donnell, for the purpose of allowing said Harry J. O'Donnell to take the stand as a witness on behalf of the United States; to which ruling of the Court counsel for the United States then and there noted an exception which was duly allowed by the Court.

And in order to further maintain the issues involved in the above entitled cause, after the foregoing evidence on behalf of the United States had been introduced and before any evidence for the defense had been introduced, counsel for the United States formally moved that the jury be directed then and there to render a verdict of not guilty as to the defendant Harry J. O'Donnell upon the indictment in this cause, and counsel stated that the proffer was made so that the defendant Harry J. O'Donnell could be placed on the witness stand as a witness on behalf of the Government. Objection was made by counsel for the defendants on the ground that an indictment for high-
way robbery was pending against the defendant Harry J.
65 O'Donnell upon the facts involved in this cause, and that the
matter was entirely within the discretion of the Court; and this objection was sutained by the Court, and the Court refused to instruct the jury then and there to return a verdict of not guilty as to defendant Harry J. O'Donnell in order to allow the defendant Harry J. C'Donnell to take the stand as a witness on behalf of the United States; to which ruling of the Court and its refusal aforesaid counsel for the United States then and there noted an exception, which was duly allowed by the Court.

After further evidence had been introduced, the Government rested its case; and no evidence for the defendants having been introduced,
the Court thereupon instructed the jury as follows:
33 The COURT. "Gentlemen of the jury, after carefully consid-
ering this case, and in view of the evidence which has been taken, I do not believe I ought to submit it to you at all, and I think I will have to instruct you to return a verdict on this indictment in favor of the defendants. With that, the Government accedes as to one of the defendants. There are some other circumstances connected with the other defendant that are different from those which relate to the other one of the defendants. But the allegations in the indictment that this act was committed purposely with the intent to kill the deceased does not seem to have been proven by such clear testimony that I would be justified in allowing a verdict to stand, even if one should be rendered against these parties; it seems to me it would be the duty of the court to set aside such a verdict as that on a motion for a new trial, on the testimony as it now stands. Of course the court may be in error in its treatment of these so-called confessions, but with those excluded from the case it seems to me that there is no evidence upon which you could base a verdict of guilty of murder either in the first or second degrees. A charge of robbery, of course,

is pending against these men, but that is not connected with this indictment at all, and it seems to me that I ought really in fairness to both parties—the Government perhaps as well as the defendants—
66 to simply instruct the jury to return a verdict for the defendants, and give the Government an exception, and let it take the case up on the matter of law. It seems to me I should dispose of the case in the way I have indicated;" and thereupon, upon motion of counsel for the defendants, the Court directed the jury to bring in a verdict finding for the defendants, and each of them, not guilty of the charge in the indictment, which was done accordingly, and the jury brought in a verdict of not guilty as to each of the defendants; to which ruling and instruction of the Court, counsel for the United States then and there noted an exception, which was duly allowed by the court.

All of the exceptions herein stated having been duly taken, allowed, settled and noted during the trial, and before the jury was directed to return a verdict as aforesaid, the counsel for the United States present to the Court this their bill of exceptions and pray the Court to sign and seal the same and make same part of the record, to have the same effect as if each of the said exceptions were contained in a separate bill and had been signed and sealed during the trial, according to the statute in such case made and provided, and the same is accordingly done, now for then, this 27th day of March, A. D. 1907.

JOB BARNARD, *Justice.* [SEAL.]

67 34 *Order Correcting Order of March 15, 1907, Extending Time, &c.*

Filed April 1, 1907.

In the Supreme Court of the District of Columbia, holding a criminal term.

UNITED STATES, PLAINTIFF, *vs.* CHARLES R. EVANS AND HARRY J. O'DONNELL, DEFENDANTS.	No. 25202.

It appearing to the Court that it was the intention of the Court to include in the order passed herein, March 15th, 1907, extending the time for filing the bill of exceptions in the above entitled cause, for the period of ten days, to also include the time for filing the transcript of record in the Court of Appeals, and it appearing that said order passed on said 15th day of March, 1907, is incorrect, in that it fails to include the extension of the time for the filing of the transcript as aforesaid, it is this 1st day of April, 1907, by the Court, ordered that the aforesaid order of March 15th, 1907, be, and the same hereby is, corrected so as to read that the time for filing the bill of exceptions and transcript of record in the Court of Appeals in the above entitled

cause be, and the same hereby is, extended for the period of ten days, including the said first day of April, 1907.

JOB BARNARD, *Justice.*

68 Supreme Court of the District of Columbia.

MONDAY, *April 1st, 1907.*

The Court resumes its session pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

UNITED STATES
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 25202.

Indicted for murder, first degree.

It is by the Court ordered that the time for filing bill of exceptions and transcript of record of the above entitled cause, in the Court of Appeals of the District of Columbia, be, and the same hereby is, extended to and including Friday, April 5th, 1907.

69 *Directions to clerk for preparation of transcript of record.*
35

Filed March 27, 1907.

In the Supreme Court of the District of Columbia.

UNITED STATES
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL, defendants. } Criminal. No. 25202.

Murder—first degree.

The clerk will prepare the transcript of record in the above-entitled cause, and it will include the following:

1. The indictment.
2. The pleas.
3. The verdict.
4. The order extending time for filing bill of exceptions.
5. The bill of exceptions.
6. This order.

DANIEL W. BAKER,
U. S. Attorney, D. C.

Service of a copy of the foregoing acknowledged this — day of March, A. D. 1907.

T. C. TAYLOR,
Attorney for Defendants.

70 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 69, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 25202, criminal; United States versus Charles R. Evans and Harry J. O'Donnell, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 4th day of April, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1773. United States, appellant, vs. Charles R. Evans et al. Court of Appeals, District of Columbia. Filed Apr. 5, 1907. Henry W. Hodges, clerk.

36 WEDNESDAY, *May 8th, A. D. 1907.*

UNITED STATES, APPELLANT,
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 1773.

The argument in the above-entitled cause on the question of jurisdiction was commenced by Mr. Stuart McNamara, attorney for the appellant, and was continued by Mr. Thos. C. Taylor, attorney for the appellees, and was concluded by Mr. D. W. Baker, attorney for the appellant.

37 UNITED STATES, APPELLANT,
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 1773.

OPINION.

(Mr. Chief Justice Shepard delivered the opinion of the Court:)

The appellees were tried under an indictment for murder in the Supreme Court of the District on February 1, 1907, and found not guilty. The United States have appealed, assigning error on exceptions taken during the trial to the exclusion of certain evidence in the nature of confessions of the defendants that were offered against them.

This right to appeal is claimed under section 935 of the Code, which reads as follows:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as

is given to the defendant, including the right to a bill of exceptions; provided, that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

It is the well-settled rule of the common law that the State or the United States have no right to sue out a writ of error upon a judgment in a criminal case. United States v. Sanges, 144 U. S., 310. In that case, a writ of error upon a judgment sustaining a demurrer to an indictment was dismissed for want of jurisdiction. A writ of error sued out upon a like judgment was also dismissed by this court, on the ground that the jurisdiction was not conferred by the seventh section of the act, approved February 9, 1893, by which the court had been created, notwithstanding the generality of its language. (United States v. Ainsworth, 3 App. D. C., 483.)

The right was, however, subsequently conferred by the section aforesaid, and was exercised without question in a case where an indictment had been set aside on demurrer. (United States v. Evans, 28 App. D. C., 264.)

It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The contention of the appellants is, that it lies also upon a judgment where there has been a verdict of not guilty, not, however, to obtain a reversal of that judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise. The evil consequences that would result from such an exercise of jurisdiction are apparent. The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically "moot" cases, where opposing views have not been presented.

38 In the recent statute permitting writs of error to the Circuit Courts and the Circuit Courts of Appeal of the United States generally, approved March 2, 1907, it is evident that Congress had such a situation as this in mind; and it expressly limited the review to the character of judgments mentioned hereinabove. Without denying the right of Congress to exercise the broad power contended for, which has been exercised and upheld in some of the States, the question for determination is whether it was intended to be conferred upon this court by the special provisions of section 935. Ordinarily,

penal statutes in derogation of the common law are strictly construed. And this construction is especially strict when this meaning is asked to be extended to an extraordinary length, effecting a change in a long-established practice heretofore considered essential to the protection of individuals from possible oppression. In other words, such an intention must be expressed in words of no uncertain meaning. Considering the language of section 935 in the light of this principle, we do not find that it was the plain intention of Congress to confer the power of appeal to the extent and for the purposes contended for. The declaratory part of it is satisfied, in our opinion, by the extension of the right of appeal to the limited extent heretofore indicated. The proviso may have been added, out of abundant caution, to prevent a possible misconception of the previous language, and, consequently, too broad a construction of its meaning.

Certain decisions of this court relied on by the appellants are not controlling (D. C. v. Lynham, 16 App. D. C., 85)—was a writ of error to the police court, maintained under a statute permitting the grant of such writs, and was decided before the enactment of section 935. The question of jurisdiction was neither raised nor discussed. Doubtless the statute referred to was deemed a sufficient extension of the power, considering the nature of the case and the jurisdiction of the police court. But it is unnecessary to enter upon a discussion of that decision, as it was not founded on any construction of the statute now under consideration (in D. C. v. Garrison, 25 App. D. C., 563, D. C. v. Gant, 28 App. D. C., 186)—the jurisdiction was asserted without question or discussion; but the judgment discharging the defendant in error in each case was affirmed.

Entertaining the opinion that section 935 does not extend the rignt of appeal to this case, the appeal is dismissed for want of jurisdiction.

Dismissed.

39 TUESDAY, *June 4th, A. D. 1907.*

UNITED STATES, APPELLANT, *vs.* CHARLES R. EVANS AND HARRY J. O'DONNELL.	No. 1773. April term, 1907.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

Per MR. CHIEF JUSTICE SHEPARD, *June 4, 1907.*

40 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 39, inclusive, contain a true copy

of the transcript of record and proceedings of said Court of Appeals in the case of United States, appellant, vs. Charles R. Evans and Harry J. O'Donnell. No. 1773, April term, 1907, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 30th day of September, A. D. 1907.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

41 In the Court of Appeals of the District of Columbia.

THE UNITED STATES, APPELLANT,
vs.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 1773.

STIPULATION AS TO RETURN.

It is hereby stipulated by counsel for the parties of the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the return of the clerk of the Court of Appeals of the District of Columbia to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
THOS. C. TAYLOR,
Counsel for Respondents.

JUNE 6, 1908.

(Endorsed:) No. 1773. United States, Appellant, vs. Charles R. Evans and Harry J. O'Donnell. Stipulation as to transcript in the Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 22, 1908. Henry W. Hodges, clerk.

42 In the Court of Appeals of the District of Columbia.

UNITED STATES, APPELLANT,
v.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 1773.

In obedience to the writ of certiorari filed in this cause and returned herewith, I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, hereby certify the foregoing to be a true copy of the stipulation of counsel filed herein agreeing that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Court of Appeals to said writ of certiorari.

In testimony whereof I hereunto subscribe my name and
[SEAL.] affix the seal of said Court of Appeals, at the city of Washington, this 23d day of June, A. D. 1908.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and Charles R. Evans and Harry J. O'Donnell are appellees, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States.

44 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

45 (Indorsed:) File No. 21174. Supreme Court of the United States. No. 771, October term, 1907. The United States vs. Charles R. Evans and Harry J. O'Donnell. Writ of certiorari. Court of Appeals, District of Columbia. Filed June 22, 1908. Henry W. Hodges, clerk.

46 (Indorsed on cover:) File No. 21174. Supreme Court U. S. October term, 1908. Term No., 394. The United States, petitioner, vs. Charles R. Evans and Harry J. O'Donnell. Writ of certiorari and return. Filed June 24th, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PETITIONER,
v.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The Solicitor-General, on behalf of the United States, respectfully prays the court to issue a writ of certiorari to review the judgment of the Court of Appeals in the above-entitled case, No. 1773 on the docket of that court for its April Term, 1907.

This case is one of considerable public gravity and importance, as it involves the construction of the statute enacted by Congress giving the Government a general right of appeal in criminal cases in the District of Columbia, namely, section 935 of the District Code (31 Stat., 1189, 1341), which provides:

> SEC. 935. *Appeals by United States and District of Columbia.*—In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Pro-*

> *vided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

In construing this statute the Court of Appeals held that it did not authorize an appeal by the United States in a case in which a verdict of acquittal had been rendered, although the language of the statute is that "in *all* criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the *same* right of appeal that is given to the defendant, including the right to a bill of exceptions," and the only provision with respect to a verdict of acquittal is that "if *on such appeal* it shall be *found* that there was error in the rulings of the court during the trial, *a verdict in favor of the defendant shall not be set aside.*" This latter provision manifestly contemplates that the Court of Appeals shall, "on such appeal," determine whether "there was error in the rulings of the court during the trial," although it shall not set aside a verdict of acquittal for that cause, while the provision for a bill of exceptions provides a method for saving and presenting such questions for the determination of the Court of Appeals.

The Court of Appeals rested its judgment upon the impropriety of allowing the Government to bring up a case for the determination of questions of law that can not affect the appellee if he has been acquitted, which supposed impropriety has enabled it to discover an ambiguity that it is submitted does not really exist.

The Government contends that the manifest purpose of Congress was to adopt a procedure already in vogue in a number of the States by which the perpetuation of error committed in the trial of criminal cases is prevented and a conflict of decision at *nisi prius* avoided.

The opinion of the Court of Appeals in this case, omitting the caption, was as follows (35 Wash. Law Rep. 452):

> The appellees were tried under an indictment for murder in the Supreme Court of the District, on February 1, 1907, and found not guilty. The United States have appealed, assigning error on exceptions taken during the trial to the exclusion of certain evidence in the nature of confessions of the defendants that were offered against them.
>
> This right of appeal is claimed under section 935 of the Code, which reads as follows:
>
> "In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."
>
> It is the well-settled rule of the common law that the State or the United States have no right to sue out a writ of error upon a judgment in a criminal case. (United States *v.* Sanges, 144 U. S., 310.) In that case, a writ of error

upon a judgment sustaining a demurrer to an indictment was dismissed for want of jurisdiction. A writ of error sued out upon a like judgment was also dismissed by this court on the ground that the jurisdiction was not conferred by the seventh section of the act, approved February 9, 1893, by which the court had been created, notwithstanding the generality of its language. (United States *v.* Ainsworth, 3 App. D. C., 483.)

The right was, however, subsequently conferred by the section aforesaid, and was exercised without question in a case where an indictment had been set aside on demurrer. (United States *v.* Evans, 28 App. D. C., 264.) It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant had not been put in jeopardy.

The contention of the appellants is, that it lies also upon a judgment where there has been a verdict of not guilty, not, however, to obtain a reversal of that judgment, but to obtain an opinion, upon exceptions taken at the trial, that may serve as a rule of observance in cases that may hereafter arise. The evil consequences that would result from such an exercise of jurisdiction are apparent. The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal, and may not even appear. Nor can his appearance be

enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically "moot" cases, where opposing views have not been presented.

In the recent statute permitting writs of error to the Circuit Courts and the Circuit Courts of Appeal of the United States generally, approved March 2, 1907, it is evident that Congress had such a situation as this in mind, and it expressly limited the review to the character of judgments mentioned hereinabove. Without denying the right of Congress to exercise the broad power contended for, which has been exercised and upheld in some of the States, the question for determination is whether it was intended to be conferred upon this court by the special provisions of section 935. Ordinarily, penal statutes in derogation of the common law are strictly construed. And this construction is especially strict when its meaning is asked to be extended to an extraordinary length, effecting a change in a long-established practice heretofore considered essential to the protection of individuals from possible oppression. In other words, such an intention must be expressed in words of no uncertain meaning. Considering the language of section 935 in the light of this

principle, we do not find that it was the plain intention of Congress to confer the power of appeal to the extent and for the purposes contended for. The declaratory part of it is satisfied, in our opinion, by the extension of the right of appeal to the limited extent heretofore indicated. The proviso may have been added, out of abundant caution, to prevent a possible misconception of the previous language, and, consequently, too broad a construction of its meaning.

Certain decisions of this court relied on by the appellants are not controlling. D. C. *v.* Lynham, 16 App. D. C., 85, was a writ of error to the Police Court, maintained under a statute permitting the grant of such writs, and was decided before the enactment of section 935. The question of jurisdiction was neither raised nor discussed. Doubtless the statute referred to was deemed a sufficient extension of the power, considering the nature of the case and the jurisdiction of the Police Court. But it is unnecessary to enter upon a discussion of that decision, as it was not founded on any construction of the statute now under consideration. In D. C. *v.* Garrison, 25 App. D. C., 563, and D. C. *v.* Gant, 28 App. D. C., 186, the jurisdiction was asserted without question or discussion; but the judgment discharging the defendant in error in each case was affirmed.

Entertaining the opinion that section 935 does not extend the right of appeal to this case, the appeal is dismissed for want of jurisdiction. Dismissed.

It is submitted that the language of section 935 of the Code is clear and explicit. The only qualification upon the broad right of appeal given the Government being that a verdict in favor of the defendant should not be set aside, although error might be found by the appellate court to have been committed in the rulings of the trial court, no other qualification can be properly added by construction, nor the right to have the rulings of the trial court reviewed denied.

Opinions may of course differ as to the policy of the legislation in question, but this court has repeatedly held that the policy or wisdom of a statute is for the determination of the legislature and not for the courts. It was therefore a matter for Congress to decide whether the good which would come from preventing the perpetuation of error in the trial of criminal cases and securing uniformity of decision among the trial justices in the courts of the District outweighed the evil of an ex parte argument of such questions in the Court of Appeals, assuming that an acquitted party would not appear. Besides, ex parte proceedings are not unusual, and that it does not necessarily follow that an acquitted party would not appear upon such an appeal is shown by what occurred in this case, the appellees being represented on the argument in the Court of Appeals by counsel.

The fact that several appeals have been allowed under this act to the District of Columbia, without question, in cases where the defendant had been acquitted by the jury, while of course not conclusive, is persuasive as to the clear meaning of the statute.

It is to be observed that Congress had already given the Government a right of appeal to the Court of Appeals from the police court of the District in all cases, without any limitation whatever (Act of March 2, 1897, 29 Stat., 607). In District of Columbia *v.* Lynham (16 App. D. C., 85), where the defendant had been tried and acquitted in the police court, the Court of Appeals, in an opinion by Chief Justice Alvey, under the authority of this statute, reversed the judgment and remanded the case for a new trial. This statute is preserved in section 227 of the District Code (31 Stat., 1225). The intention of Congress to change the common-law rule in this respect is therefore clear.

The meaning of the section 935 of the District Code being clear, the only question that can properly arise is as to its constitutionality. The power of Congress so to provide is recognized in United States *v.* Sanges, 144 U. S., 310, 318, where this court said:

> In either case, the defendant having once been put upon his trial and discharged by the court, is not to be again vexed by the same cause unless the legislature acting within its constitutional authority has made express provision for the review of the judgment at the instance of the Government.

In this case, the provision that a verdict in favor of the defendant shall not be set aside on such appeal eliminates the only real question that might be made as to the constitutionality of such a statute.

In other jurisdictions similar statutes exist permitting the State to appeal merely for the purpose of securing an authoritative decision as a rule for the guidance of the trial courts in future cases.

In State *v.* Granville, 45 Ohio State, 264, 278, the Supreme Court of Ohio said:

> We are asked, however, in case the exception is sustained, to remand the cause for further proceedings upon the indictment. This we are satisfied can not be done. The purpose of this proceeding, as will appear from the sections of the statute under which it is had, is not, in any case, to obtain a reversal of the judgment of the court in the case in which the bill is taken; its purpose is simply to determine the law to govern in a similar case. (Sections 7305, 7306, 7307, 7308, Revised Statutes.)

To the same effect are State *v.* Buechler, 57 Ohio State, 95, and State *v.* Ruedy, 57 Ohio State, 224.

In State *v.* Van Valkenburg (60 Ind., 302) the Supreme Court of Indiana recognized the right of the State to appeal from a judgment in a criminal case where the defendant was acquitted, in order to obtain its opinion upon matters of law.

In Commonwealth *v.* Bruce (79 Ky., 560) the Court of Appeals of Kentucky said:

> The first question is as to the power of this court to review the rulings of the lower court upon judgment of acquittal in felony cases. It was held in Commonwealth *v.* Cain (14 Bush), and we now hold, that such judgments may be reviewed on the appeal of the Com-

> monwealth for the purpose of securing a uniform and correct administration of justice, although the judgment can not be reversed. This we think is the proper construction to be given to sections 335, 337, and 339 of the Criminal Code.

To the same effect is Commonwealth *v.* Van Tuil (1 Metcalf (Ky.), 1).

In State *v.* Tait (22 Iowa, 140) the constitutionality of a statute giving a right of appeal to the State was affirmed.

In State *v.* Ward (75 Iowa, 637) the Supreme Court of Iowa held that the State had a right of appeal under the State Code for the purpose of obtaining a "correct exposition of the law where the trial court had instructed the jury, upon the proof, to find a verdict for the defendant."

In State *v.* Lee (65 Conn., 265) the Supreme Court of Errors of the State of Connecticut, in a carefully considered opinion, upheld the constitutionality of the statute of that State giving the State a general right of appeal in all criminal cases. In that case the court also overruled the contention that the statute of the State did not authorize an appeal where the defendant had been acquitted, although such statute did not contain any qualification as to the effect of a verdict of acquittal such as exists in section 935 of the District Code. In its opinion the court said (p. 277):

> The United States Supreme Court, in an opinion delivered by Justice Gray, has collated the authorities, English and American,

> or the common-law practice, and reached conclusions which will doubtless be generally accepted, *i. e.*, the right of the Crown at common law to a writ of error, after acquittal, is not wholly free from doubt; the practice in a few of our States recognizes the right of the prosecutor to proceedings in error; in a great majority of the States the courts hold "that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, *except under and in accordance with express statutes*, whether that judgment is rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." (U. S. *v.* Sanges, 144 U. S., 310.)

If, as the Court of Appeals says, the provision of section 935 of the District Code that a verdict of acquittal shall not be set aside for errors of law in the rulings of the trial court renders the case before that court practically a moot one, it is sufficient to say that the power of Congress to legislate on this subject is plenary, and in conferring jurisdiction upon the courts of the District it is not limited by the provisions of the third article of the Constitution (section 2), by which the judicial power of the United States is extended only to "cases" and "controversies"; although if not a "case" within the meaning of that provision, this case might, perhaps, still come within the category of "controversies to which the United States shall be a party."

In some of the States it has been held proper to require the courts to render advisory opinions to

the legislative and executive branches of the Government; but whatever may be said of that practice, it requires no argument to show that the determination of legal principles, practice, and procedure for the guidance of nisi prius courts is a judicial function and peculiarly appropriate to an appellate court.

It is respectfully submitted that, in view of the manifest error committed by the Court of Appeals and the gravity of the case, a writ of certiorari should issue as prayed.

HENRY M. HOYT,
Solicitor-General.

MAY, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
CHARLES R. EVANS AND HARRY J. O'DONNELL.
No. 394.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

This was an indictment for murder in the Supreme Court of the District of Columbia. Defendants were found not guilty, and the United States took an appeal to the Court of Appeals under section 935 of the District Code, assigning error on exceptions taken during the trial to the exclusion of certain evidence. The case was dismissed by the Court of Appeals for want of jurisdiction, and is now before this court on writ of certiorari to review that decision.

Inasmuch as the same general question, as to the right of the Government to a review in a

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criminal case, is involved here as in *United States* v. *Dickinson*, No. 362 of the present term, the Solicitor-General respectfully moves the court to advance this case for hearing immediately after the Dickinson case.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
CHARLES R. EVANS AND HARRY J. O'DONNELL. } No. 394.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Evans and O'Donnell were indicted in the Supreme Court of the District of Columbia for the murder of Maurice J. Holloran, alleged to have been committed in an attempted robbery of the deceased. During the course of their trial, the Government offered in evidence statements of both Evans and O'Donnell, made by them respectively to a local detective, taken down by a stenographer, and transcribed and signed. (Rec., pp. 27, 34.) The court excluded these statements on the ground that they were not voluntary (Rec., p. 22), and,

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in the absence of other sufficient evidence on behalf of the Government, directed the jury to bring in a verdict of not guilty (Rec., p. 39).

The United States took an appeal to the Court of Appeals of the District of Columbia (Rec., p. 4), which dismissed the appeal for want of jurisdiction (Rec., pp. 41–43), holding that an appeal after a verdict of acquittal was not authorized by section 935 of the District Code.

Upon application of the Government, this court at its last term granted a writ of certiorari to review the case.

ASSIGNMENT OF ERROR.

The Court of Appeals erred in holding that section 935 of the Code of the District of Columbia did not authorize the appeal in this case, and in dismissing the case for want of jurisdiction.

ARGUMENT.

Question may be made as to the authority of this court, upon petition of the Government, to issue a writ of certiorari in a criminal case. This question is fully discussed in the brief of the Government in the case of the *United States* v. *Dickinson*, No. 362, assigned to be heard herewith.

In addition, two questions are presented to the court in this case. *First*, whether Congress intended, by section 935 of the Code, to give to the Government an appeal in a criminal case after

verdict; and, *second*, whether, if it did so intend, it was within the constitutional power of Congress to enact such legislation.

I.

Whether Congress Intended to Give the Government a Right of Appeal in a Criminal Case After Verdict.

Section 935 of the District Code (31 Stat., 1189, 1341) is as follows:

> SEC. 935. *Appeals by United States and District of Columbia.*—In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial a verdict in favor of the defendant shall not be set aside.

This statute seems to be as free from doubt or ambiguity as the English language can make it. The right of appeal given the United States and the District of Columbia extends to *all* criminal prosecutions and is identical with that given to the defendant, including the right to a bill of exceptions. If there were any doubt as to the intention of Congress to authorize an appeal by the Government after a verdict of acquittal had been rendered, it is removed by the proviso, "That if *on* such appeal *it shall be found* that there was error in the

rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

The proviso to section 935 plainly contemplates that the appellate court shall examine for error the rulings of the trial court to which exceptions have been taken, but provides that a verdict in favor of the defendant shall not be set aside.

The Court of Appeals, in its opinion, wholly ignored this proviso. Its judgment is based entirely upon, as it thought, "the evil consequences that would result from such an exercise of jurisdiction," and is in plain disregard of the language of the statute.

This court has repeatedly held that the policy or wisdom of a statute is for the determination of the legislature, not the courts.

If the proviso to section 935 had been omitted, there could have been no question, in view of the broad language of the section, that the Government would have had a right of appeal in a case in which a verdict of acquittal had been rendered. Congress in adding the proviso recognizes this fact by providing that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside. It will be observed that the direction is that in the contingency mentioned a verdict in favor of the defendant shall not be *set aside*, not that the appeal shall be *dismissed*.

The Court of Appeals could not consider this proviso without being forced to the conclusion that Congress had in mind the allowance of an appeal on the part of the Government where there had been a verdict in favor of the defendant, and the review by the appellate court of the rulings of the trial court during the trial. It was obliged, therefore, in order to reach the conclusion which it did, to ignore the language of the proviso entirely.

The allowance of an appeal for the purpose of settling questions of law, practice, and procedure for the guidance of trial courts in future cases is not new in the legislation of this country.

In *State* v. *Granville* (45 Ohio State, 264, 278) the Supreme Court of Ohio said:

> We are asked, however, in case the exception is sustained, to remand the cause for further proceedings upon the indictment. This we are satisfied can not be done. The purpose of this proceeding, as will appear from the sections of the statute under which it is had, is not, in any case, to obtain a reversal of the judgment of the court in the case in which the bill is taken; its purpose is simply to determine the law to govern in a similar case. (Sections 7305, 7306, 7307, 7308, Revised Statutes.)

To the same effect are *State* v. *Buechler* (57 Ohio State, 95) and *State* v. *Ruedy* (57 Ohio State, 224).

In *State* v. *Van Valkenburg* (60 Ind., 302) the Supreme Court of Indiana recognized the right of the

State to appeal from a judgment in a criminal case where the defendant was acquitted, in order to obtain its opinion upon matters of law.

In *Commonwealth* v. *Bruce* (79 Ky., 560) the Court of Appeals of Kentucky said:

> The first question is as to the power of this court to review the rulings of the lower court upon judgment of acquittal in felony cases. It was held in *Commonwealth* v. *Cain* (14 Bush), and we now hold, that such judgments may be reviewed on the appeal of the Commonwealth for the purpose of securing a uniform and correct administration of justice, although the judgment can not be reversed. This we think is the proper construction to be given to sections 335, 337, and 339 of the Criminal Code.

To the same effect is *Commonwealth* v. *Van Tuil* (1 Metcalf (Ky.), 1).

In *State* v. *Ward* (75 Iowa, 637) the Supreme Court of Iowa held that the State had a right of appeal under the State Code for the purpose of obtaining a "correct exposition of the law where the trial court had instructed the jury, upon the proof, to find a verdict for the defendant."

Nor was the granting of a right of appeal to the Government in a criminal case entirely new legislation in the District of Columbia. By the act of Congress of March 2, 1897 (29 Stat., 607), the Government was given a right of appeal to the Court of Appeals from the police court of the District in all cases, without any limitation whatsoever. In

District of Columbia v. *Lynham* (16 App. D. C., 85), where the defendant had been tried and acquitted in the police court, the Court of Appeals, in an opinion by Chief Justice Alvey, reversed the judgment and remanded the case for a new trial, under the authority of this statute, which is preserved in section 227 of the District Code (31 Stat., 1225).

Section 935 of the District Code is, therefore, new legislation only in that it gives the Government an appeal in criminal cases tried in the Supreme Court of the District.

The proviso that a verdict in favor of the defendant should not be set aside on such appeal for error in the rulings of the court during the trial may have been added either for the purpose of avoiding any question of double jeopardy or to avoid any severity toward the defendant. But whatever the reason, the proviso was clearly not added for the purpose of limiting the right of appeal on the part of the Government. It was a limitation only upon the action of the appellate court upon such an appeal where a verdict in favor of the defendant had been rendered *in a case in which error in the rulings of the trial court had been found.*

II.

As to the power of Congress to enact section 935 of the District Code.

In *United States* v. *Sanges* (144 U. S., 310), the right of the Government to an appeal in a criminal case, under the judiciary act of 1891, was exhaust-

ively considered. That case, while holding that Congress did not intend by the act referred to to give the right of appeal in a criminal case, plainly recognizes its power so to do.

In *United States* v. *Macdonald* (207 U. S., 120, 127), on writ of error to the Circuit Court of the United States for the Eastern District of Louisiana under the act of March 2, 1907 (34 Stat., 1246), the court said:

> The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this. We do not perceive the difficulty. No doubt of the power of Congress is intimated in *United States* v. *Sanges*, 144 U. S., 310. If the Fifth Amendment has any bearing, the act of 1907 is directed to judgments rendered before the moment of jeopardy is reached. *Kepner* v. *United States*, 195 U. S., 100, 128. We think it unnecessary to discuss the question at length.

In *State* v. *Lee* (65 Conn., 265), a statute giving the State a general right of appeal in all criminal cases was upheld and applied to a case where a verdict of acquittal had been rendered, the court citing the Sanges case as authority therefor.

In view of these decisions, the only question that can possibly be made as to the constitutionality of section 935 of the Code arises out of the provision that on such an appeal a verdict in favor of the defendant shall not be set aside for error in the rulings of the trial court. The Court of Appeals

refers to a case of this kind as being practically a "moot" one, and it may be suggested that it is not a "case" or "controversy" within the meaning of the third article of the Constitution (sec. 2) by which the judicial power of the United States is extended only to "cases" and "controversies."

A case, in the sense of the Constitution, it has been said "arises when some subject touching the Constitution, laws, and treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or equity instituted according to the regular course of judicial proceedings." (2 Story on Const., sec. 1646; *Osborne* v. *Bank of United States*, 9 Wheat., 738, 819.) It is submitted that the present proceeding falls within this definition of a case, notwithstanding the practical elimination of the defendant by the verdict of acquittal. For other definitions of "cases" and "controversies" see *Pacific Whaling Co.* v. *United States* (187 U. S., 447); *Smith* v. *Adams* (130 U. S., 167); *Fisk* v. *Henarie* (32 Fed., 417, 423); *Home Ins. Co.* v. *North Western Packet Co.* (32 Iowa, 223, 238.)

But whether this is or not a case or controversy within the meaning of the third article of the Constitution, it is unnecessary to inquire, because it is submitted, the courts of the District of Columbia are not of the class referred to in that article, and Congress in conferring jurisdiction upon them is not limited, as it is by the third article of the Con-

stitution with respect to the inferior federal courts, to "cases" and "controversies."

The courts of the District of Columbia are created by Congress by virtue of its authority "to exercise exclusive legislation in all cases whatsoever over such district." (Const., art. 1, sec. 8, clause 17.) In this respect the courts of the District are to be classed with the territorial courts. This is the view clearly intimated in *McAllister* v. *United States* (141 U. S., 174, 184), where the court said:

> These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not courts of the United States created under the authority conferred by that article. And there is nothing in conflict with this view in *Page* v. *Burnstine*, 102 U. S., 664, where it was held that section 858 of the Revised Statutes of the United States, relating to the competency as witnesses of parties to actions by or against executors, administrators, or guardians, applied to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. That conclusion was reached, *not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power*

> *of the United States was vested by the Constitution*, but because all the acts relating to the competency of witnesses, when construed together, indicated that that section of the Revised Statutes applied to the courts of the District of Columbia.

It may be said, however, that while Congress in establishing a judiciary system in the District of Columbia is not limited in defining its jurisdiction to "cases" and "controversies," within the meaning of the third article of the Constitution, the spirit of the Constitution is such as to prohibit Congress from imposing upon the courts of the District any other than judicial powers and duties. In *Loughborough* v. *Blake* (5 Wheat., 317, 324) the court held that the spirit of the Constitution did not prohibit taxation in the District without representation. But, assuming that there is any weight in this suggestion, the answer is that the determination of questions of law, practice, and procedure arising in an actual case, by an appellate court, for the guidance of the trial courts, is purely a judicial matter.

In some of the States it has been held proper to require the courts to render advisory opinions to the legislative and executive branches of the Government. Whatever may be said of this practice, it seems clearly within the power of Congress, in view of its plenary powers of legislation over the District, to require the Court of Appeals to decide

questions of law, practice, and procedure for the guidance of the trial courts. It will be observed that the Court of Appeals does not deny the power of Congress in this respect, but has nullified its legislation by an erroneous interpretation of section 935 of the District Code.

It is, therefore, respectfully submitted that the judgment of the Court of Appeals dismissing the appeal in this case should be reversed, with directions to reinstate the case and determine the issues presented.

HENRY M. HOYT,
Solicitor-General.

DECEMBER, 1908.

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UNITED STATES *v.* EVANS.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 394. Submitted December 18, 1908.—Decided April 19, 1909.

Under § 935 of the Code of the District of Columbia, act of March 3, 1901, c. 854, 31 Stat. 1341, a writ of error will not lie from the Court of Appeals to the Supreme Court of the District at the instance of the Government to review a judgment based on a verdict of not guilty.

When the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal for the purpose of establishing a rule of observance in cases subsequently arising is not an exercise of judicial power.

Writ of certiorari to review 30 App. D. C. 58, quashed.

THE facts are stated in the opinion.

The Solicitor General for petitioner:

Congress clearly intended to give the United States a right of appeal in criminal cases, after verdict. The statute seems to be free from doubt or ambiguity. 31 Stat. 1189, 1341 (§ 935, Code D. C.).

The policy or wisdom of a statute is for the determination of the legislature, not of the courts.

The allowance of an appeal for the purpose of settling questions of law, practice and procedure for the guidance of trial courts in future cases is not new in the legislation of this country. *State* v. *Granville*, 45 Ohio St. 264, 278; *State* v. *Buechler*, 57 Ohio St. 95; *State v. Ruedy*, 57 Ohio St. 224; *State* v. *Van Valkenburg*, 60 Indiana, 302; *Commonwealth* v. *Bruce*, 79 Kentucky, 560; *Commonwealth* v. *Van Tuil*, 1 Metcalf (Ky.), 1; *State* v. *Ward*, 75 Iowa, 637.

Congress undoubtedly had the power to enact § 935 of the District of Columbia Code. *United States* v. *Sanges*, 144 U. S. 310; *United States* v. *Macdonald*, 207 U. S. 120; *State* v. *Lee*, 65 Connecticut, 265.

This proceeding is a "case" or "controversy" within the meaning of the third article of the Constitution of the United States, by which the judicial power of the United States is extended only to "cases" and "controversies." 2 Story on Const., § 1646; *Osborn* v. *Bank*, 9 Wheat. 738, 819; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447; *Smith* v. *Adans*, 130 U. S. 167; *Fisk* v. *Henarie*, 32 Fed. Rep. 417, 423; *Home Ins. Co.* v. *North Western Packet Co.*, 32 Iowa, 223, 238.

But whether this is or not a case or controversy within the meaning of the third article of the Constitution, it is unnecessary to inquire, because the courts of the District of Columbia are not of the class referred to in that article, and Congress in conferring jurisdiction upon them is not limited, as it is by the third article of the Constitution with respect to the inferior Federal courts, to "cases" and "controversies."

The courts of the District of Columbia are created by Congress by virtue of its authority "to exercise exclusive legislation in all cases whatsoever over such district." Const., Art. I, § 8, clause 17. In this respect the courts of the District are to be classed with the territorial courts. This is the view clearly intimated in *McAllister* v. *United States*, 141 U. S. 174, 184.

No counsel appeared for respondents.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Appellees were tried under an indictment for murder in the Supreme Court of the District of Columbia on February 1, 1907, and found not guilty. The United States appealed to the Court of Appeals of the District, and assigned error on exceptions taken during the trial to the exclusion of certain evidence. This right to appeal was claimed under § 935 of the code, which reads as follows:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions; provided, that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

The appeal was dismissed for want of jurisdiction, and the case brought here on certiorari.

The case of *United States* v. *Sanges*, 144 U. S. 310, reiterated the then well-settled rule that the right of review in criminal cases was limited to review at the instance of the defendant after a decision in favor of the Government. *United States* v. *Dickinson*, *ante*, p. 92.

In *United States* v. *Evans*, 28 App. D. C. 264, under § 935 of the code, the right was exercised without question in a case where an indictment had been set aside on demurrer, and Chief Justice Shepard, in delivering the opinion of the court in this case (30 App. D. C. 58), said:

"It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy."

But the Chief Justice further said that it was contended by appellants that a writ of error lies also "upon a judgment where there has been a verdict of not guilty, not, however, to obtain

a reversal of that judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise."

But this contention was rejected by the court in view of the objectionable consequences that would result from such an exercise of jurisdiction. "The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

It was in the light of these considerations that the act of Congress of March 2, 1907, 34 Stat. 1246, c. 2564, was subjected to the limitations therein contained. *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Mason*, *ante*, p. 115.

By the constitutions of several of the States the justices of the highest judicial tribunals are obliged to give their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or the governor or governor and council, and there are many interesting discussions in the state reports, as well as in articles by the law writers, in respect of such a provision.[1]

But no such requirement obtains in Federal jurisprudence.

Such a provision was suggested in the Federal Constitutional Convention, but disappeared in the Committee on Detail.

[1] Thayer on Advisory Opinions, Legal Essays, 43; Dubuque, The Duty of Judges as Constitutional Advisors, 24 Amer. Law Review, 369; Emery, C. J., 2 Maine Law Review, 1; Cases collected in 6 Amer. & Eng. Cycl. (2d. ed.) 1065. And see 103 Maine, 306, and especially opinion of Savage, J.

In 1793 President Washington sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France, but they declined to respond. Marshall thus speaks of the matter in his Life of Washington:

"About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." Story on the Constitution, § 1571.

It was long ago held by this court that the discharge of such a function was not an exercise of judicial power. *United States* v. *Ferreira*, 13 How. 40, note on page 52; *Hayburn's Case*, 2 Dall. 409; see note, pp. 410, 411, 412, 413, 414. And that ruling sustains the conclusion of the Court of Appeals, in the matter of the construction of this act to which the opinion is confined.

Writ of certiorari quashed.